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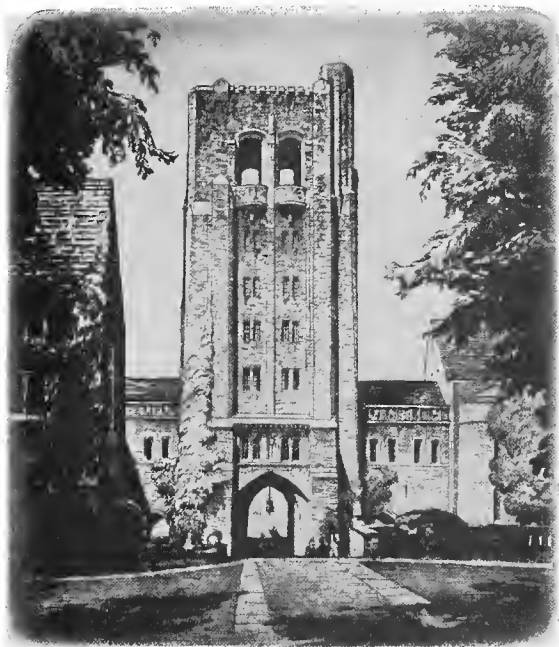
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Elements of the Laws;

OR,

OUTLINES OF THE SYSTEM

OF

CIVIL AND CRIMINAL LAWS

IN FORCE IN

THE UNITED STATES, AND IN THE SEVERAL
STATES OF THE UNION.

Designed as a Text-Book and for General Use,

AND TO ENABLE ANY ONE TO ACQUIRE A COMPETENT KNOWLEDGE OF HIS

LEGAL RIGHTS AND PRIVILEGES,

IN ALL THE MOST IMPORTANT POLITICAL AND BUSINESS RELATIONS OF
THE CITIZENS OF THE COUNTRY;

WITH THE

PRINCIPLES UPON WHICH THEY ARE FOUNDED,

AND THE

MEANS OF ASSERTING AND MAINTAINING THEM IN CIVIL AND
CRIMINAL CASES.

By THOMAS L. SMITH,

LATE ONE OF THE JUDGES OF THE SUPREME COURT OF THE STATE OF INDIANA.

NEW AND REVISED EDITION.

PHILADELPHIA

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P R E F A C E.

EVERY intelligent person should understand the nature of the government under which he lives, and the primary principles of the laws relating to his personal rights and obligations. No species of information can be more valuable or more necessary than that which is calculated to enable one to comprehend his proper position as a member of the community, to avoid legal disputes and entanglements in his intercourse with his fellow-men, and to maintain his own rights without infringing those of others, in the various transactions whercin he may be required to take part.

That a knowledge of the laws is so rarely attempted to be taught as a branch of common education may, probably, be accounted for by the prevalence of an idea that it can only be attained by a long course of study, too difficult and abstruse for any but those who are designed for professional pursuits.

It is true, the law, like every other science, offers a wide field for investigation ; but the acquisition of a knowledge of its elementary principles is not so difficult a task as has commonly been imagined, and may be attained as easily and with as much facility as a corresponding degree of proficiency in any other department of learning.

This book has been prepared under the belief that a more concise exposition of the system of laws in force in the United States, than any that has hitherto been offered, would be useful and acceptable. It will serve to point out the proper lines of investigation to those who may desire to examine the subjects treated of in their more minute details; and it will afford a general knowledge of the various branches of the law, sufficient, perhaps, for the ordinary purposes of persons who have not the leisure or inclination to master more voluminous works.

In many instances, the language of standard authors has been adopted, either entire or with slight modifications; but as numerous quotation marks and notes of reference would have been cumbrous and inconvenient, in a work designed for elementary instruction, they have not been used. Care has been taken to avoid the discussion of controverted questions, and to state only such principles of law as are well established.

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ELEMENTS OF THE LAWS.

CHAPTER I.

OF THE ORIGIN OF LAWS.

THE word *law*, in its most comprehensive sense, signifies *a rule of action*, and is sometimes applied indiscriminately to all kinds of actions, whether of animate or inanimate bodies, whereby definite and uniform results are invariably produced. The laws of particular states or nations are called *municipal laws*, from the Latin word *municipalis*, which in that language designated that which pertained to a free city or town, but which we have extended to what belongs to a state or nation as a distinct and independent body.

Municipal laws are, therefore, rules of civil conduct prescribed by the authority of a state, to regulate the actions of the inhabitants in their intercourse with one another. They are designed for the good government of the people, and to protect every individual in the enjoyment of those rights which belong to him.

The laws of all countries may be said to have commenced when there first began to be a state or organized society in the land; for whenever people associate together for any purpose, it is immediately found necessary

What does the word "law" signify? What are the laws of particular states called? What is a municipal law? For what are such laws designed?

that they should consent to the establishment of rules to define what each may do, and what he shall not do, in order that the objects of the association may be peaceably and satisfactorily attained.

Even when young people meet to play at a game, or to enjoy any of the sports of youth, they at once find that certain rules must be made and adhered to for the regulation of the conduct of the actors. Without such rules no association for any purpose could be long maintained, and they are, obviously, indispensable for the regulation of the infinite variety of relations which exist between individuals associated in large communities or nations, where every one is more or less connected with others in the transaction of all the affairs of life.

Municipal laws have their origin, therefore, in their necessity for the convenience or security of the people of a state, and in the *consent of the people* by and for whom they are made, given in consequence of such necessity. This consent may be given in writing by the people themselves, or, in large communities, by their representatives duly empowered to do so, when their consent is said to be *expressed*; or, such consent of the people may be inferred or *implied* from long-continued custom or usage.

Laws originating from the express consent of the people are called the *written* or *statute laws*, and those which are founded on the consent implied from custom or usage constitute that system which, in England and in this country, is known by the denomination of the *common law*.

In a highly civilized state of society, the relations between individuals become so intricate, and the questions which may arise concerning them are of such infinite variety, that it is impossible to make laws expressly

When and how did municipal laws originate? On what kind of consent are the statute laws founded? How is the consent of the people to the common law inferred?

adapted to meet every case that may occur. To do so, it would be necessary to anticipate every conceivable combination of human actions, which is manifestly impracticable.

Neither is it possible to make any system of laws so perfect as to require no subsequent changes. No human wisdom or foresight could anticipate every act that would call for their interposition, while the increase of population and the progressive advancement of the arts and sciences constantly create new subjects for the commerce of mankind, and require new rules, or additions to and alterations of such as may have been primarily established.

While, therefore, the laws of a country date their origin from the commencement of the country or nation itself, they consist chiefly of such rules relative to individual rights and privileges as have been from time to time required by the peculiar circumstances and exigencies of the people, and of such principles and maxims as by long usage and great experience have been found best adapted for the determination of all disputed questions.

CHAPTER II.

OF THE COMMON LAW.

A VERY large portion of the United States was originally settled by emigrants from Great Britain. These emigrants brought with them the laws of England, which consisted mainly of usages and customs that had acquired the authority of laws, by virtue of that tacit consent of

Of what do the laws of a country chiefly consist? From whence did the people who first settled this country emigrate? What laws did they bring with them?

the people which is implied from their having been adopted and practised during a long period of time.

At first, colonies were formed under the authority of the British crown ; and when those colonies became independent and formed themselves into sovereign states, they did not abrogate or repeal the laws which had previously been in existence, but continued them in force, making such changes by express enactment as were necessary under the new circumstances in which they were placed.

It is therefore necessary, in order to understand the laws of our country, to have some knowledge of those brought by our ancestors from England, for they constitute the basis or groundwork of our whole system.

The primitive Britons who inhabited England were subjugated by the Romans. Afterward, the kingdom was invaded successively by the Picts, the Saxons, the Danes, and the Normans. These nations introduced and incorporated many of their own customs with those that had been before established. At first, different customs prevailed in the different provinces, according as these different races of people were more or less numerous in those different provinces. But, as they became at length united under one government, great inconveniences were experienced from these local differences in the laws, and efforts were from time to time made to establish one uniform system, common to the whole kingdom, by collecting, from among all these different customs, those which were best adapted to the wants and necessities of the whole people. The system thus formed was called the *common law*, because it was common to the whole nation, and to distinguish it from the local laws, which had formerly prevailed only in particular counties or provinces.

Under what government were the colonies established ? What change did the Revolution make in the laws previously established ? Why is the common law so called ?

The common law, as it now exists, may therefore be said to be compounded of the various customs introduced by the several races of people from whom sprang the present English race. Among these, however, the Saxon laws, or customs, appear to have had a predominating influence.

The common law thus established is said, in England, to be the law of the kingdom, as it existed before any statute or act of parliament was made to alter it. It prescribed rules for the administration of justice. It defined the prerogatives of the king, and the rights and liberties of the subject. It directed how lands should descend upon the death of the owners; the manner and forms of conveying property from one to another; the forms, solemnities, and obligations of contracts; the rules for the exposition of deeds, and all other written instruments; the process, proceedings, jurisdiction, judgments, and executions of courts of justice; and the several kinds of criminal offences, and their punishment.

The principles of the common law are fully adhered to in this country; but some of the rules resulting from the application of those principles to certain facts existing in England are inapplicable here, because such facts are wanting or different; and others are varied, because, otherwise, from the difference of our local circumstances, they would be entirely inappropriate.

Thus, for instance, navigable streams or watercourses are equally public highways in England and in this country; but in England streams are regarded as navigable only where the tide ebbs and flows, which is not the case with regard to the large rivers of the United States, some of which are navigable for thousands of miles above the reach of tides. Thus, also, a sovereign power or autho-

Of what is it compounded? What subjects does it embrace in England?

rity is equally recognised here as in England; but the rights and powers which are there vested in the king, are here transferred to the state or government.

With the exception of these changes, necessarily resulting from the different state of facts, and the alterations which have been made by statutes, or acts of the legislatures, the common law, embracing the vast range of subjects above mentioned, is still in full force throughout the United States.

CHAPTER III.

OF WHERE THE COMMON LAW IS TO BE FOUND.

At the period the common law of England was in process of formation, a profound ignorance of letters overspread the whole Western world. The ancient Britons, as well as the Saxons, had little idea of writing. They committed their laws to memory; and hence, for a long time, all their laws were traditional. For this reason, the common law is sometimes called the unwritten law, or the law founded on immemorial custom or usage.

It is not to be understood, however, that the common law is at present merely oral, or communicated to us from former ages only by tradition. Efforts were made, at a very early date, to collect the maxims and customs of which it is constituted, and have them reduced to writing.

Ethelbert, the first Christian king of England, is said to have caused a compilation of the Saxon laws to be made and published; and King Alfred, who lived three

To what extent is the common law in force in the United States? Why is it sometimes called the unwritten law? Has it ever been reduced to writing? In what manner, and to what extent?

hundred years afterward, caused another collection to be made, in a work called the Dome-Book. Edward the Confessor is said also to have caused a digest of the laws to be made. These books are, unfortunately, all lost, but there are several others of later date, which are held in great estimation as authoritative expositions of the common law.

The most ancient work extant on that subject is one written by the famous and learned Glanvil, who was lord chief-justice of England during the reign of Henry II. There is another, by Littleton, written during the reign of Edward IV. During the reign of James I., Sir Edward Coke published his celebrated *Institutes of the Law, and Commentary on Littleton*. But the best and most methodic work on the subject is the *Commentaries on the Laws of England*, published about the year 1765, by Sir William Blackstone, which has ever since been regarded as a most valuable text-book.

Besides these works, there are many other treatises, of greater or less repute, upon various branches of the common law.

But as the common law is said to consist of long-continued customs or usages, so the best authority as to the existence of such customs is to be found in the decisions of the courts, which are tribunals established for the express purpose of determining all questions relative to the existence, construction, and administration of the laws. These decisions are preserved in books containing reports of the cases heard and determined; and the rules and principles laid down in the various treatises upon different branches of the law, are derived almost wholly

What ancient works are there upon the subject? Where is the best authority on the subject to be found? How are the decisions of the courts preserved?

from the collation and analysis of the cases which have been so decided.

Such decisions of the courts are sometimes called *precedents*, and they are referred to as authority, when similar questions afterward arise, upon the principle that the best mode of proving that this or that maxim is a rule of the common law, is by showing that it has always been the custom so to observe it.

When a question arises as to whether a certain proposition is or is not a rule of the common law, the principal thing to be ascertained is whether or not it has always been so regarded. Just in proportion, therefore, as law-books serve to prove, by reason and reference to decided cases, that such has or has not been the case, their authority is considered weighty or otherwise.

With regard to precedents, if there is a series of them reaching back so far as to show that the matter in question has always been a custom or established usage, they are binding, and are to be followed, whatever opinion may be entertained of the propriety or justice of the law itself. There are three principal reasons for this rule :

First, as persons may very readily differ in their opinion as to the justice of a law, if judges were to take such an opinion for their criterion, there would be no uniformity, and the law would be good or bad, as the ability and the integrity of the judge for the time being were greater or less. Secondly, it is to be considered that, as such has always been the law, the public have acted under it, and have conformed to it in their business transactions ; so that, in all probability, many persons would be injured by an unexpected change. And, thirdly,

What are such decisions called when referred to as authority ? Upon what principle is it that precedents are considered good authority ? When are precedents so binding that they must necessarily be followed ? What are the principal reasons why they should be so followed ?

whenever the public interest would be thereby promoted, a change can always be more safely and satisfactorily made by an express or statutory law, promulgated by the law-making department of the government.

But if there has not been a long series of precedents, as, for instance, if the proposition in question is only supported by one or more recent decisions, they are not binding further than the reasons given approve themselves to the understanding of subsequent inquirers. It is, however, useful to refer to such decisions, because, in many cases, the questions involved have been therein investigated with great care and learning, and they may afford material assistance in arriving at a correct conclusion.

The cases which give rise to questions of law are like the human countenance in this respect, that the facts developed in each one vary in some particulars from those found in any of the others. For this reason it is that, though so many laws have been made, and so many courts have been engaged for thousands of years in deciding such questions, they are still as far as ever from being exhausted.

Consequently, it still frequently happens that a case arises which calls for the declaration of a new principle, or presents facts which give rise to a question for which no precedents can be found. In such cases, it becomes necessary to determine the question thus presented by the best exercise of the reasoning faculties; and it is in this sense that the common law is sometimes said to be the perfection of human reason; for when no other authority is attainable, the case must necessarily be decided according to what would appear to be the reasonable and just rights of the parties; and, in such cases, what is really

When are precedents not necessarily binding? For what purposes are they then referred to? In what sense is it that the common law is sometimes called the perfection of human reason?

right is, by a kind of fiction, supposed to have always been the law, though it may not have been noticed or commented upon in any of the books to which we now have access.

CHAPTER IV.

OF THE CANON AND CIVIL LAWS.

IN England, one branch of the common law consists of those peculiar laws which, by custom, have been adopted and are used only in certain peculiar courts and jurisdictions; namely, the ecclesiastical courts, the military courts, the courts of admiralty, and certain courts held by two universities. The peculiar laws which are permitted to be used in those courts, under certain restrictions, are the *canon* and the *civil* laws.

There are no such courts in this country as some of those above named; but the American student should have at least a general idea of the origin and nature of those laws, and especially of the civil law, as the forms and modes of procedure of some of our courts, and many of the most enlightened and useful principles of the common law, are derived from that source. It is still frequently referred to in questions of doubt and difficulty, and in such cases very valuable assistance is sometimes afforded by it.

The canon law consists partly of rules taken from the Holy Scriptures; partly of the writings of the ancient fathers of the church; partly of ordinances of general and provincial councils; and partly of the decrees of the popes in former ages.

Of what does the canon law consist?

This law relates only to such matters as the Roman Catholic church has or had jurisdiction over. After the Reformation, it was continued in force in England by virtue of an act of parliament, passed during the reign of Henry VIII., which enacted that such of the canon laws as were not repugnant to the laws of the land, or the king's prerogative, should be used and executed. They are used chiefly in matters which concern religion and the clergy; but as some of the ecclesiastical courts in England have jurisdiction with respect to wills, the administration of estates, legacies, contracts of marriage, &c., their decisions upon questions relating to those subjects are sometimes referred to by the courts of this country.

The term *civil law* is chiefly applied to the laws of the ancient Romans. They are composed of the constitutions of the ancient kings; the twelve tables of the Decemviri; the laws or statutes enacted by the senate or people; the edicts of the prætors; the opinions of learned lawyers; and the imperial decrees, or constitutions of successive emperors. A code was compiled about the year A.D. 438, by order of the emperor Theodosius the Younger, but the body of civil laws now in use, and best known, was compiled about the year 533, by Trebonian, under the orders of the emperor Justinian.

This body of laws consists of—1st. The *Institutes*, which contain the elements or first principles of the Roman law, in four books; 2d. The *Digest*, or *Pandects*, in fifty books, containing the opinions and writings of eminent lawyers; 3d. A *New Code*, or collection of imperial constitutions,

By what authority is it in force in England? To what subjects does it chiefly relate? For what purposes is it referred to by the courts of this country? What is the civil law? Of what is it composed? By whom, by whose order, and when was the great body of civil law now in use compiled? What are the works called in which that body of laws is contained?

in twelve books ; 4th. The *Novels*, or new constitutions, posterior in time to those contained in the other books.

The Digest is divided into seven parts. The first part contains the elements of the law, as relating to what is justice, right, &c. The second treats of judges and judgments ; the third, of personal actions ; the fourth, of contracts, powers, and pledges ; the fifth, of wills, testaments, &c. ; the sixth, of the possession of goods ; and the seventh, of obligations, crimes, punishments, &c.

The Institutes are an epitome or abridgment of the Digest. The Novels were so called because they were new laws, published at different times after the first compilations were made.

Soon after the time of Justinian, amid the disasters which attended the decline and fall of the Roman empire, the science of law, as well as all the other learned arts and sciences, fell into neglect and almost total oblivion. It was not until about the year 1130, when a copy of the Digest was accidentally found at Amalfi, in Italy, that a taste for the study of the law began again to manifest itself. After that period, the civil law was cultivated in several nations ; and it now forms the basis of the laws used in most of the countries of continental Europe, and of the states on the continent of America which were formed by colonies from those countries.

But in England and in the United States, excepting perhaps Louisiana, the civil law is not in force as a distinct and independent body of laws, but only so far as certain of its modes of procedure, maxims, and principles have, by custom and usage, been adopted by or incorporated into the common law.

What is the nature of their contents respectively ? When was the study of the civil law revived, and how ? In what countries does it form the basis of the national laws ? To what extent is it in force in this country ?

CHAPTER V.

OF EQUITY.

THE distinction between what is properly called law, and that branch of the law which is denominated *equity*, originated in England, and was brought by our ancestors from that country.

It was found by experience that many laws, though beneficial in the main, in consequence of the infinite diversity of the relations between man and man, operated with unforeseen hardship, and even injustice, in particular cases. It was necessary, however, that the judges of the ordinary courts should pursue the strict letter of the law in all cases; for if the liberty was given them to modify the law, so as to administer it according to what they might deem the equity or justice of the particular case, the effect would have been to destroy all law, and leave the decision of every question entirely in the power of the judge. This would have made every judge a legislator, and would have been productive of infinite confusion.

The system which is now called equity was introduced to remedy this difficulty, and it seems to have originated in this wise:—When, in ancient times, the courts of law, confining themselves strictly to the letter of their authority, gave a judgment which, in consequence of some peculiar circumstances, operated harshly upon one of the parties concerned, he was permitted to apply to the king, as the supreme authority, for redress. Upon such application, the king mitigated the severity or supplied the defects of the judgment pronounced by the court of law—being governed in his judgment by what in his conscience he believed to be equitable and just.

Where did the distinction between law and equity originate? What gave occasion to this distinction?

In process of time, as such applications became numerous, the king deputed the hearing of them to an officer called a *chancellor*—a term derived from the Latin word *cancellarius*, because he sat behind a *railing*, to avoid being incommoded by the crowd of people. As business increased, the people addressed their applications to the chancellor, and not to the king; and thus, by degrees, the court of chancery became an established tribunal, and acquired jurisdiction over many important subjects.

At first, therefore, the administration of equity was governed only by the conscience of the king or chancellor; and hence the latter, who was supposed to act merely as the deputy of the former, has been frequently called the keeper of the king's conscience. But from time to time rules were established; and now all the subjects of chancery jurisdiction are as well defined, and the laws applicable to them are as well known, and as inflexible, as those relating to other matters. In other words, the principal defects and imperfections of the law, whereby, in consequence of its inflexibility or the want of sufficient qualifications of its general rules, it failed to prevent hardships to particular individuals, have been remedied, or at least may be remedied, by the rules adopted in the courts of equity; and these rules have been incorporated into and form a part of the common law.

Equity, therefore, is not now understood to mean such notions of what is right and equitable as the mind or conscience of a judge may entertain, but the adherence to such rules of law as are maintained and enforced in the courts of chancery.

What gave occasion for the appointment of a chancellor? Why was that officer so called? Why was he sometimes called the keeper of the king's conscience? By what rules was the administration of equity originally governed? What important change has since taken place in the rules established by courts of chancery? What is the term *equity* now understood to mean?

CHAPTER VI.

OF WRITTEN, OR STATUTE LAWS.

FROM the foregoing chapters it will be understood that the common law consists of certain principles, which have been established by the common consent of the people, and which prescribe, or are supposed to prescribe, rules for the decision of all questions that can arise from the social relations of man with his fellow-man.

These principles have been derived from various sources. They were declared indeed as they became necessary, and according to the exigencies of the occasions which called them forth. Some of them originated with the Saxon and other Northern nations; others were derived from the canon and civil laws; and others are still from time to time declared by the courts of the present day, when they are required for the settlement of disputes. Still others are derived from the collateral system of equity or chancery jurisprudence, which for a long period of time has been endeavouring to establish rules for the relief of particular cases, or for such modifications of the general laws as will prevent them from operating in such particular cases with hardship or injustice.

The consent of the people to the establishment of these principles as laws is implied from their usage; and the proof of such usage, so far as they have been developed and declared, is to be found in the cases reported as decided by the judicial tribunals established for the purpose of making such decisions.

They have not been reduced to writing, or put in the form of statute laws, because of the impossibility of doing

so without increasing the statute law to such enormous bulk that it would be as inconvenient for reference as the reports in which they are now to be found ; and because such is the infinite diversity of human relations, that it is impossible to foresee or provide for all questions that may give rise to disputes : wherefore, notwithstanding the vast number of decisions that have been made, new questions occur as frequently now as at any former time ; and the exercise of the reasoning faculties of those whose province it is to administer the laws, is as constantly called into requisition to interpret, to modify, and to make a proper application of the rules which have been heretofore adopted.

The common law, therefore, forms the basis or groundwork upon which our whole system of laws rests. It forms, indeed, an entire and whole system in itself ; so that if there were no statute laws whatever to regulate the intercourse between the private individuals composing the nation, there would be no want of rules for the settlement of such disputes as might arise.

But inasmuch as the binding force of the common law is derived from the implied consent of the people, and no such consent can be implied when there is an express declaration to the contrary, when the common law and the statute law differ or come in conflict, the former is entirely annulled, and the principles or rules declared by the latter are substituted in its place. Hence the common law always gives place to a statute law when there is one upon the same subject. And as all laws, whether established by an implied or an express consent, may be changed at will by those who had authority to make them, an old law always gives place to one of more recent date.

The statute law of England consists of statutes or acts

Why has not the common law been reduced to the form of statute laws ? What is the result when the common law comes in conflict with a statute law ? And when a new statute differs from an elder one ?

of parliament, made by the king, by and with the advice and consent of the lords and commons in parliament assembled. It has been already stated, in a former chapter, that our forefathers, when they emigrated to America, brought with them all the laws of the parent state which were applicable to their new condition and circumstances. It has also been stated, that the change from colonial to state governments did not annul the laws then in force in the colonies respectively. Consequently, the statute laws of England which were in existence at the time the colonies were formed, and the statutes made by the colonial legislatures, except such as have since been expressly repealed or annulled, are still in force in the states which were formed by the colonies.

The written or statute laws of the United States may, therefore, be comprised under the following heads:—First, certain acts of the parliament of England, passed before the first settlement of this country. Secondly, statutes made by the colonies during the existence of the colonial governments. Thirdly, the constitutions of the several states. Fourthly, the statutes or acts passed by the legislatures of the several states since their organization. Fifthly, the constitution of the United States. Sixthly, the statutes or acts passed by the Congress of the United States. And, seventhly, treaties made with foreign governments, under the authority of the United States.

These statutes are not intended to supersede or abolish the common law, but to aid in carrying its principles into practical operation. They refer chiefly, first, to the organization of the nation; prescribing the form and mode of government, with the manner of the selection and the duties and obligations of the various persons appointed to

Of what does the statute law of England consist? What statute laws of England are in force in this country? Under what heads may the statute laws of the United States be comprised?

act in an official capacity. Secondly, to the ascertainment and definition of the rights and obligations of all the members of the community. And, thirdly, to the means of maintaining and enforcing those rights and obligations, either by one individual demanding restoration or recompense for their violation of another, or by the infliction of punishment for such invasions of those rights as are declared to be offences against the whole body of society.

CHAPTER VII.

OF THE FORM AND STRUCTURE OF THE GOVERNMENTS OF THE UNITED STATES.

WHEN the colonies which ultimately formed the original thirteen United States declared their independence, and severed their connection with England, the governmental authority under which they had previously existed was entirely dissolved. Not only was each colony perfectly independent of all the others, but the inhabitants of the colonies respectively all stood upon an equal footing. There were no persons among them possessing any more or greater rights to assume the government of the others than any other persons. Such being the case, all the rights of government or of sovereignty necessarily became invested in the whole body of the citizens, each one possessing an equal share.

To what do the statute laws of the United States chiefly refer—as to the organization of the nation? the ascertainment of rights? and the enforcement of rights? Where did the powers of government vest when the colonies became independent of Great Britain? How did they vest in the people?

Hence, no authority could of right be exercised, except such as was directly conferred by the people themselves. The great principle that lies at the foundation of all our institutions is peculiar in this, that, while in almost all other civilized countries the governor or sovereign ruler is in himself considered the source of all power, and the rights and privileges of the citizens descend to them as boons or favours granted by him, in the United States the source of all political power is in the people, from whom all the rights and privileges of those who govern ascend and exist only during their permission.

After the dissolution of the British government, then, the inhabitants of each colony met in primary assemblies, and appointed delegates to represent them in the formation of an independent government. Those delegates accordingly assembled in a convention, and there formed the written constitution under which the state government was organized.

Thus each colony became possessed of an independent state government, but as yet there was no connection or bond of union whatever between the states that were thus formed. They united for the purposes of mutual support and assistance during the revolutionary war, under articles of confederation; but it was not until the 17th of September, 1787, that the present constitution of the United States was adopted by a convention of delegates from twelve of the then existing states. A convention was afterward summoned in each state, by the authority of its legislature, to consider of the propriety of adopting the constitution thus formed; and it was finally ratified and adopted by all the states.

What is the great principle peculiar to our institutions? How were the state governments formed? What bond of union had they with each other? When was the present constitution of the United States adopted? How was it ratified?

The constitutions of the several states may be regarded as charters granted by the people thereof respectively, creating a form of government and prescribing the manner in which it shall be executed. Of course, all the departments of the government derive their authority from this source. They have none but such as are thus given to them; and every act performed by any one acting in an official capacity, that is not authorized by the powers granted by the constitution, is utterly null and void. All powers not thus granted are reserved by the people themselves; and they may revoke those powers or grant others by the formation of a new constitution, as has been done by several of the states.

In the constitutions of some of the states, there are provisions requiring the legislatures to provide for taking a vote of the people at certain fixed periods, as to whether a convention shall be called for the purpose of revising or amending their constitutions; but no doubt is entertained that the people may at any time, in a legal manner, demand by their vote that a convention be called for such a purpose.

In like manner, the constitution of the United States gives the consent of the people of the several states to the exercise of the powers therein granted, but of no others. This consent is not, however, to be regarded as the consent of the people of the whole territory embraced by the Union, to the establishment of a government for one consolidated nation, but as the consent of the people of each state to the ceding of certain portions of the state sovereignty, to be exercised for the benefit and advantage of all the states. In all other respects the state sovereignty remains in full force and independence.

What are the constitutions of the several states? What powers have the people over them? How was the consent of the people given to the constitution of the United States?

There exist, therefore, in the United States two different kinds of government; namely, the general government of the United States, which is strictly limited to the powers given it by the constitution of the United States, but to that extent possesses supreme authority in all the states; and those of the several states respectively, which are again limited by the constitutions of those states, but over which the general government possesses no authority whatever. These different kinds of government have each their allotted sphere, within which neither has any right to interfere with the other. The powers granted to the general government cannot be assumed or exercised by the government of any single state; but all powers not so granted are retained by the several states, as fully and perfectly as if they were separate and independent nations.

CHAPTER VIII.

OF THE LEGISLATIVE DEPARTMENT OF THE GOVERNMENT OF THE UNITED STATES.

THE powers granted by the constitution to the government of the United States are distributed to three departments; namely, the legislative, the executive, and the judiciary. The legislative powers are vested in the *Congress of the United States*, which consists of a senate and house of representatives.

What different and distinct governments do there exist in the United States? Within what spheres do they operate? What power has one over the other? In what departments are the powers of the government of the United States vested? Where are the legislative powers vested?

The *House of Representatives* is composed of members chosen every second year by the people of the several states. No person can be a member of this house who has not attained the age of twenty-five years and been seven years a citizen of the United States, and also, when elected, an inhabitant of the state in which he was chosen.

Each state is entitled to send a number of representatives to this body in proportion to the number of its population; which number of population, thus to be represented, is to be determined by adding to the whole number of free persons, (including those bound to service for a term of years, but excluding Indians not taxed,) three-fifths of all other persons. An enumeration of the inhabitants of all the states is made every ten years, for the purpose of adapting the ratio of representation to the changes which may have taken place. It is provided that the number of representatives shall not exceed one for every thirty thousand, but that each state shall have at least one representative.

The house of representatives appoints its own speaker and other officers, and has the sole power to cause charges to be preferred against an officer of the federal government for mal-administration of his office, with a view to his removal—which is called the power of impeachment.

The *Senate* is composed of two senators from each state, who are chosen by the legislatures of the states respectively, and hold their offices for the term of six years.

No person can be a senator who has not attained to the age of thirty years, been nine years a citizen of the United States, and, when elected, an inhabitant of the state for which he shall have been chosen.

How is the house of representatives composed? What are the qualifications of its members? How are they apportioned to the states? How are its officers appointed? How is the senate composed? What are the qualifications of its members?

By a provision made with respect to the first organization of the senate, the terms of one-third of the whole number of its members expire every second year, so that its existence is perpetuated by biennial accessions of newly-elected members in that proportion.

The vice-president of the United States is, by virtue of that office, president of the senate, and presides over its deliberations when present; but he has no vote, unless the senate should be equally divided. The senate chooses all its other officers, and also a president for the time being when the vice-president of the United States is absent, or when he shall exercise the office of president of the United States.

The senate has the sole power to try all impeachments, on charges preferred by the house of representatives; and on such trials the concurrence of two-thirds of all the members present is required to convict any person. Its judgment, in cases of impeachment, extends only to removal from office and disqualification to hold any office under the United States; and the party convicted is not thereby released from liability to indictment and punishment for the offence committed, according to the laws of the country.

The times, places, and manner of holding elections for senators and representatives are prescribed in each state by state laws; but congress has power, should it think proper to exercise it, to make or alter such regulations with respect to the election of representatives.

How and at what times do their terms of office expire? Who presides at the sittings of the senate? When has the vice-president of the United States a vote? How are the other officers of the senate chosen? Who has the power to make an impeachment? Who to try an impeachment? What is the effect of a conviction on an impeachment? How are the times, places, and manner of holding elections for senators and representatives prescribed?

The congress must assemble at least once in every year, and such meeting must be on the first Monday in December, unless they appoint a different day by law.

Each house has the power to judge of the elections, returns, and qualifications of its own members; to determine the rules of its proceedings; to punish its members for disorderly behaviour; and, with the consent of two-thirds, to expel a member.

A majority of each house constitutes a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner and under such penalties as each house may provide.

Each house is required to keep a journal of its proceedings, and, from time to time, to publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house, on any question, must, at the desire of one-fifth of those present, be entered on such journal.

Neither house can, during the session of congress, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

The senators and representatives receive a compensation for their services, to be fixed by a law of congress, and paid out of the treasury of the United States. They are privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same, in all cases except treason, felony,

How often does congress assemble, and when? What number constitutes a quorum? What may a smaller number do? What power has each house to punish members for disorderly conduct? What record of proceedings is there required to be kept? When is the consent of both houses to an adjournment necessary? How is the compensation of the members fixed? What are their privileges as regards arrest?

and breach of the peace ; and they cannot be questioned in any other place for any speech or debate in either house

No senator or representative can, during the time for which he was elected, be appointed to a civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person holding any office under the United States can be a member of either house during his continuance in such office.

All bills for raising revenue must originate or be first proposed in the house of representatives ; but the senate may propose or concur with amendments, as on other bills. Every bill which shall have passed both houses must, before it becomes a law, be presented to the president for his approval. If he approves he must sign it, but if not he must return it, with a statement of his objections, to the house in which it originated, to be reconsidered. If, upon such reconsideration, it is again passed by a vote of two-thirds, in each house, taken by calling for the "ayes and noes" of the members, it becomes a law, notwithstanding the disapproval or veto of the president.

If any bill shall not be returned by the president within ten days, Sundays excepted, after it shall have been presented to him, it becomes a law in like manner as if he had signed it, unless the congress by their adjournment within such period prevent its return, in which case it does not become a law.

Every order, resolution, or vote to which the concurrence of both houses may be necessary, except on a ques-

What other offices disqualify persons from being members ? Where must bills for raising revenue originate ? What more is necessary after a bill has passed both houses to make it a law ? If the president refuses to sign a bill, how may it become a law ? If he does not return the bill within ten days, what is the result ? What is necessary to give effect to orders, resolutions, and votes of both houses ?

tion of adjournment, must in like manner be approved by the president before it can take effect ; or, in case of his disapproval, must be reconsidered and passed in the same manner as in the case of a bill.

CHAPTER IX.

OF THE LEGISLATIVE POWERS OF CONGRESS.

THE constitution of the United States confers upon congress the power to make laws for the following purposes :—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States ; but all such duties or taxes must be uniform throughout the United States.

To borrow money on the credit of the United States.

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

To coin money, regulate the value thereof and of foreign coin, and to fix the standard of weights and measures.

To provide for the punishment of counterfeiting the securities and current coin of the United States.

To establish post-offices and post-roads.

What powers has congress to legislate as to taxes? To borrowing money? To commerce? To naturalization and bankruptcy? To coining money? To counterfeiting? To post-offices and roads? *

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

To constitute judicial tribunals inferior to the supreme court.

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

To raise and support armies; to provide and maintain a navy; and to make rules for the government and regulation of the land and naval forces. But no appropriation of money can be made for the support of an army for a longer period than two years.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia, according to the discipline prescribed by congress.

To exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by the cession of particular states and the acceptance of congress, become the seat of government of the United States; and to exercise like authority over all places pur-

What power has congress to legislate as to science and the useful arts? To inferior courts? To crimes? To the declaration of war? To the army and navy? To the militia? To the district where the seat of government is situated? To other places purchased for the use of government?

chased by consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

And to make all laws which may be necessary and proper for carrying into execution the powers before enumerated, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.

For these purposes, but no others, the congress of the United States has authority to make laws ; but in the exercise of that authority the constitution also imposes the following restrictions :—

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or law attainting the blood of a person, so as to prevent such person or his descendants from inheriting property which would otherwise have descended to them, and no *ex post facto* law, which means a law imposing punishment for acts committed before the passage of the law, can ever be passed.

No direct tax can be laid, unless it be in proportion to the census or enumeration of the population, taken for the purpose of proportioning the ratio of the number of representatives from the several states entitled to seats in congress.

No tax or duty can be imposed on articles exported from any state ; and no preference can be given by any regulation of commerce or revenue to the ports of one state over those of another ; nor can vessels bound to or

What powers has congress to legislate as to such other laws as may be necessary ? What restrictions are there to the powers of congress to make laws as to the writ of *habeas corpus* ? As to attainder and *ex post facto* laws ? As to the levying of taxes ? As to commerce between the states ?

from one state be required to enter, clear, or pay duties in another.

No money can be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money must be published from time to time.

No title of nobility can be granted by the United States; and no person holding any office of profit or trust under them can, without the consent of congress, accept any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Congress can make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the government for a redress of grievances.

CHAPTER X.

OF THE EXECUTIVE DEPARTMENT OF THE UNITED STATES.

THE executive powers of the government are vested in a *President* and *Vice-president* of the United States, who hold their offices for the term of four years. There is nothing in the constitution which disqualifies a president for re-election an indefinite number of times; but the first occupant of the office, the illustrious Washington, set the

As to drawing money from the treasury? As to titles of nobility? As to religion, the liberty of speech, and the right of the people to assemble? Where are the executive powers of the government of the United States vested? What are the terms of office of the president and vice-president? Their eligibility for re-election?

example of declining a re-election after serving two successive terms of four years each, and no one of his successors has ever sought an election for the third time.

No person can now be elected to the office of president or vice-president who is not a natural born citizen of the United States, and at least thirty-five years of age.

The president and vice-president are elected in the following manner :—An election is held in each state, by the voters thereof, for a number of persons equal to the whole number of senators and representatives to which the state may be entitled in the congress, who are called electors; but no member of congress or person holding any office of trust or profit under the United States can be an elector. This election is regulated by the laws of the state in which it is held; but congress has the power to fix, by a law for that purpose, the day on which it shall be held, and in that case it must be held on the same day throughout the United States. Such a law of congress has been passed within a few years, and is now in force.

The electors chosen in this manner in each state by a majority of the votes given, meet in their respective states at a time and place fixed by law, and vote by ballot for a president and vice-president. They then make lists of all the persons voted for for president and of all the persons voted for for vice-president, which they sign, certify, and transmit sealed to the president of the senate at Washington. These lists are opened at the next session of congress by the president of the senate, in presence of the senate and house of representatives, and the votes are then counted.

If any person voted for for president shall have received a majority of the votes of the whole number of electors appointed throughout the United States, he is then de-

What are the necessary qualifications for president and vice-president? How are they elected? How and where are the votes counted?

clared duly elected. If no person has received such a majority of the votes for president, then, from the persons, not exceeding three, having the highest numbers on the lists of those voted for for president, the house of representatives must immediately proceed, by ballot, to choose the president.

But when the president is thus chosen by the house of representatives, the vote must be taken by states, the representatives from each state having one vote, which is cast by the direction of a majority of the members present from such state. The quorum necessary to choose a president in this manner consists of a member or members from two-thirds of the states; and the votes of a majority of all the states are necessary to a choice.

If the house of representatives shall not choose a president whenever the right of choice shall thus devolve upon it, before the fourth day of March next following, then the vice-president must act as president, as in the case of the death or constitutional disability of the president.

In like manner as in the case of the president, if any person shall have received a majority of the votes of all the electors for vice-president, such person is immediately declared duly elected to that office; but if no person have such majority, then, from the two highest on the list of those voted for, the senate must proceed to choose the vice-president. In making such a choice, a majority of the whole number of the senators must vote for the person to be chosen.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the

If no person receives a majority of the votes for president, what is the course pursued? How do the members of the house of representatives vote for president? In case a president is not chosen by either mode, what is the result? How is the vice-president declared elected? How is he elected when no person has received a majority of the votes of the electors for that office?

powers and duties devolving upon him, the vice-president becomes the president, and holds the office for the whole remainder of the term for which the president vacating the office was elected.

Congress has power to provide by law for the case of removal, death, resignation, or inability of both the president and vice-president, and to declare what officer shall then act as president until the disability be removed or a president shall be elected.

The president receives an annual salary, which cannot be increased or diminished during the period for which he shall have been elected; and he is prohibited from receiving, within that period, any other emolument from the United States or either of the states. The salary of the president is now fixed at twenty-five thousand dollars.

Before entering upon the duties of his office he is required to take the following oath or affirmation:—

“I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States.”

The constitution requires the president to perform the following duties:—To give to congress, from time to time, information of the state of the Union, and to recommend to their consideration such measures as he shall deem necessary and expedient. He is to receive ambassadors and other public ministers; to take care that the laws be faithfully executed; and to commission all the officers of the United States.

The following powers are given to him alone:—He is, by virtue of his office, commander-in-chief of the army

When may the vice-president become president, and for what length of time? What provision is there made for the case of the vacation of the offices of both president and vice-president? How is the salary of the president regulated? What oath of office is he required to take? What duties does the constitution require of the president?

and navy of the United States, and of the militia of the several states when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments of the government, upon any subject relating to the duties of their respective offices. He may grant reprieves and pardons for all offences against the United States, except in cases of impeachment. And he has power to fill all vacancies in offices that may happen during the recess of the senate, by granting commissions which expire at the end of the next session.

He has the sole power to nominate all ambassadors, public ministers, consuls, judges of the supreme court, and all other officers of the United States whose appointment is not otherwise provided for in the constitution, and which shall be established by law; but his nominations must receive the consent and approval of the senate before any persons can be invested with these offices, except in the cases of vacancies occurring when congress is not in session.

He has authority, by and with the advice and consent of the senate, to make treaties with foreign nations, provided two-thirds of the senators present concur.

The congress may vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of the subordinate departments established to assist the president in the administration of the executive department of the government.

The president, vice-president, and all civil officers of the United States, may be removed from office on impeachment and conviction for treason, bribery, or other high crimes and misdemeanors.

What powers does he exercise alone? What are his powers with respect to the nomination of officers? With respect to making treaties? How may congress vest the appointment of officers? How may the president and other officers be removed?

CHAPTER XI.

OF THE MISCELLANEOUS PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES.

BESIDES the powers conferred upon the three great departments of the government, one of which departments can be treated of more appropriately hereafter, there are some provisions in the constitution of the United States intended to meet questions which might arise from the peculiar relations of the states with each other and with the general government. These are as follows:—

The citizens of each state are declared to be entitled to all the privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labour in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

New states may be admitted by congress into the Union; but no new state can be formed or erected within the jurisdiction of any other state, nor can any state be formed

What provisions does the constitution of the United States contain as to the rights of citizens of one state in the other states? As to persons charged with crimes fleeing into another state? As to fugitives from labour in another state? As to the formation of new states?

by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

The congress has power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States ; and nothing in the constitution must be so construed as to prejudice any claims of the United States or of any particular state.

The United States guarantees to every state in the Union a republican form of government, and engages to protect each of them against invasion, and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.

The congress, whenever two-thirds of both houses deem it necessary, may propose amendments to the constitution , or, on the application of the legislatures of two-thirds of the several states, must call a convention for proposing amendments ; which, in either case, become valid to all intents and purposes as parts of the constitution, when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by congress ; but no state can be without its consent deprived of its equal suffrage in the senate.

The constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are declared to be the supreme law of the land, and the judges in every state are bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives in congress, the members of the several state legislatures, and all executive and

As to the disposition of territory or other property? As to the protection of the states by the general government? As to amendments to the constitution? As to the supremacy of the laws?

judicial officers both of the United States and of the several states, are required to take an oath or affirmation to support the constitution of the United States ; but no religious test can ever be required as a qualification to any office or public trust.

The powers not delegated to the United States by the constitution nor prohibited by it to the states, are expressly reserved to the states respectively, or to the people.

If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honour, or shall, without the consent of congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any emperor, king, prince, or foreign power, such person ceases to be a citizen of the United States, and becomes incapable of holding any office of trust or profit.

CHAPTER XII.

OF THE CONSTITUTIONS OF THE SEVERAL STATES.

FROM what has been already said, it will be understood, that the constitutions of the several states are designed to confer upon the separate state governments, all such necessary powers as are not granted by the constitution of the United States to the general government of the Union and to limit and define such powers.

What provisions does the constitution of the United States contain as to official oaths ? As to the powers not granted by the constitution ? As to citizens of the United States accepting titles of nobility or presents, &c. ?

Keeping in view the difference in the objects of the two kinds of government, the state constitutions all bear a strong resemblance to the constitution of the United States and to each other. They are all modelled upon the same general plan, and they all contain the same jealous restrictions as to the exercise of powers which might prove dangerous to the natural rights and liberties of the people.

In all of the states the legislative authority is vested in a *general assembly*, or *legislature*, which consists of a senate and house of representatives, both elected by the people. The number of members of these houses and the length of their terms of office vary in the different states, but the terms of office are always short. In some of the states the legislature holds its sessions annually; in others, only once in two years, or biennially.

Both houses have the same powers as to the regulation of their proceedings, the appointment of necessary officers, &c., as are given to congress. All bills, before they become laws, must be passed by both houses, and must also be approved and signed by the governor, except in case of his failure to return them within a limited time. If returned with his objections, they are reconsidered; and in some of the states a simple majority of the votes of the members of each house is sufficient to pass them, notwithstanding the refusal of his signature, while in others a larger vote is requisite.

The state constitutions do not contain an enumeration of the proper subjects of state legislation; but as these embrace all matters over which the government of the United States has no control, a general power is given to

Where is the legislative authority of the several states vested? Of what bodies do the state legislatures consist? How often are their sessions held? What are their powers as to appointments, &c.? What process must bills pass through to become laws? How are the subjects of state legislation regulated by the state constitutions?

the legislatures of the states respectively to pass all laws not inconsistent with the constitution of the United States or with their own constitutions. The constitution of the United States has, however, placed the following restrictions upon state legislation :—

No state can enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make any thing but gold and silver coin a tender in payment of debts ; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts ; or grant any title of nobility.

No state can, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts laid by any state on imports or exports are declared to be for the use of the treasury of the United States ; and all such laws are subject to the revision and control of congress.

No state can, without the consent of congress, lay any duty on tonnage ; keep troops or ships of war in time of peace ; enter into any agreement or compact with another state or with a foreign power ; or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

The supreme executive power is, in each of the states, vested in a governor, who is elected at certain fixed periods of time by the qualified voters thereof. It is the duty of the governor to cause the laws to be faithfully executed, and, from time to time, to give the legislature in-

What restrictions are there in the constitution of the United States as to the power of the state legislatures to make laws ? As to treaties ? As to granting letters of marque ? As to coin ? As to bills ? As to the payment of debts ? As to crimes and contracts ? As to titles of nobility ? As to imports and duties ? As to keeping troops or ships of war ? How is the executive power of the states vested ?

formation respecting the affairs of the state, and to recommend for their consideration such measures as he may deem expedient.

The governor is commander-in-chief of the military forces of his state, except when they are called into the service of the United States. He has power to remit fines and forfeitures and to grant reprieves and pardons, under such limitations and restrictions as the constitution of the state may prescribe; and to nominate, and, with the advice and consent of the state senate, to appoint and commission all officers the appointment of whom is not otherwise provided for by the state constitution or laws.

His official patronage, or power of nomination and appointment to offices, varies very much in the different states. In those of the oldest states, in which the constitutions under which they were first organized have not been altered, the governor has the appointment of a great number of subordinate officers; but in those states which have been lately admitted into the Union, or in which new constitutions have been adopted, the appointment of almost all officers is vested in the legislature or in the people by election.

In some of the states a lieutenant-governor is elected at the same time, and to serve for the same term as the governor; and in case the office of governor becomes vacated by death, resignation, or otherwise, the lieutenant-governor assumes his powers and duties. In other states, no lieutenant-governor is elected, and, in case of vacancy, the office of governor devolves upon the presiding officer of the senate.

What are the general duties of the governors? What are their general powers? As to the militia? As to reprieves and pardons? As to the nomination and appointment of officers? How do their official patronage vary in the different states? How are vacancies in the office of governor supplied?

CHAPTER XIII.

OF THE PEOPLE.

As has been before stated, the people of this country are the source of all political power. The government in all its forms exists by and through their consent alone. The government is, in fact, to be considered as instituted by them simply because it is impossible, for the whole people, to meet and conduct the necessary business of government in primary assemblies. Hence the representative system is adopted; and all powers exercised by any and by every person in authority, are to be considered as emanating from and delegated by the whole body of the people. The term "people," as here used, is, however, to be understood as including only those persons who are entitled to the rights and privileges of citizenship, and not all those who may be inhabitants of the country.

There are two classes of citizens, the natural born and the naturalized. Natural-born citizens are those born within the limits of the United States, and the children of citizens of the United States, though born without their limits. They become citizens by birthright, no act on their part being required to invest them with all the rights and privileges enjoyed by the people of the country. If, however, they remove their residence from one state to another, they are required by the laws of each state to reside in the state to which they remove a certain length of time before they are permitted to participate in the government thereof.

All persons born within the United States are not citizens, the exceptions being, first, the children of foreigners visiting in the country, and secondly, Indians. The latter occupy a

Why is the representative system of government adopted in this country? Who are natural-born citizens? What invests them with the privileges of citizens? In case of their removal from one state to another, what privileges do they lose? Are all persons born within the United States citizens?

somewhat anomalous position, and from their intractable disposition often require to be kept in check by arms. In some of the older states, however, they have become civilized, and enjoy nearly all the privileges of citizenship, but are not subject to taxation. Negroes, who used to form the most important exception to the rule, and who were formerly held as slaves in many of the states, are now, by amendments to the constitution, entitled to all the privileges previously restricted to free white citizens.

Naturalized citizens are those persons who, though not entitled to the privileges of citizenship by birthright, have subsequently acquired them by complying with the conditions of the *naturalization* laws. In the case of a person of mature age, these laws require a previous residence of at least five years within the United States before he can be naturalized, and of at least one year within the state or territory where he makes his application for admission as a citizen. He must also, at least two years before such application, have declared his intention to become a citizen of the United States, under oath, before a state or United States court. He may then apply to any one of such courts to be naturalized, when he is required to prove by the testimony of witnesses the fact of his residence as above, and that during that time he has behaved as a man of good moral character, attached to the principles and constitution of the United States, and well disposed to the good order and happiness of the same. He then takes an oath to support the constitution of the United States and the constitution of the state in which he resides, and that he renounces for ever the government of which he was a subject, and all allegiance to every foreign prince and state. This oath, when so taken, confers upon him the rights and privileges of natural-born citizens of the United States.

By special statute, however, it is provided that any alien of

Who are naturalized citizens? How can a foreigner of mature age become naturalized? What proof is then required? What oath is he required to take?

mature age who has served in the armies of the United States, and been honorably discharged, may become a citizen without any previous declaration, and need only prove one year's residence.

Any foreigner who may have resided in the United States three years next preceding his arrival at the age of twenty-one years, may become naturalized after he arrives at that age, and after he shall have resided five years within the United States, including the three years of his minority, without having made a previous declaration of his intention to become a citizen : but he is required to comply, in all other respects, with the law regulating the naturalization of persons of mature age.

The children of persons duly naturalized, being under the age of twenty-one years at the time of their parents being so naturalized, if dwelling in the country, also become citizens by virtue of the naturalization of their parents, without any act or proceeding on their part. •

All foreigners inhabiting the country, however, are not allowed to take advantage of the naturalization laws ; as, for instance, if they be felons or lunatics, or natives of barbarous or half-civilized communities.

Owing to the peculiar formation of our government, the people may be considered as standing in the double capacity of citizens of the United States and of the several states ; and there are some classes of persons who, in some of the states, are admitted to the privileges of citizenship in the states in which they reside, though they are not citizens of the United States. Thus, in some of the states, foreigners who have simply declared their intention to become citizens of the United States, and have resided in such states a certain length of time, are permitted to vote at elections and to enjoy other

Upon what conditions may foreigners under twenty-one years of age become naturalized ? How do the children of naturalized parents become citizens ? Are there any persons admitted to the rights of citizenship in the several states who are not citizens of the United States ? Can all foreigners be admitted to the rights of citizenship ?

privileges of state citizenship, although they may not have taken the final oath of naturalization.

Those free persons who are not citizens are called *aliens*; and they are not considered as members of the society constituting the nation, but are regarded merely as temporary sojourners; and they are invested with such privileges only as courtesy to visitors would seem to require. Thus an alien may buy land, and hold or sell it while he remains in the country, but he cannot transmit it to his heirs. Upon his death it becomes the property of the state in which it is situated. Neither is he entitled to participate in the exercise of popular sovereignty at elections or on other occasions.

All persons, however, whether citizens or aliens, are subject to the laws of the country, and owe obedience to those laws; and in return, the laws extend their protection equally to all persons, so far as may be necessary to secure them in the enjoyment of their respective rights.

CHAPTER XIV.

OF THE NATURAL RIGHTS OF THE PEOPLE.

ALTHOUGH upon the dissolution of the colonial governments the people, as a mass of individuals, were free and equal, and without any form of government, they were by no means without laws. The common law as well as the acts of parliament and the acts of the colonial legislatures which had been passed in aid of it, except those having reference to the form of government only, still remained in force, and were never for one instant suspended.

What are the persons who are not citizens called? What position in the nation do aliens occupy? To what privileges are they entitled? What classes of persons owe obedience to the laws? And what classes do the laws protect?

Consequently, the change from colonial to state governments made no material change in the primary laws which had been established, except in the form and mode by which they were to be administered.

It had long been firmly established by the common law that every individual member of the community or nation possessed by nature, and as the gift of God, three great primary rights ; namely, the right of *personal security*, the right of *personal liberty*, and the right to *acquire, hold, and transfer property*.

These three great rights may be regarded as the basis upon which the whole superstructure of our laws is built; for it is the very object and aim, not only of the form of government we have adopted, but of the great body of our laws, both civil and criminal, to maintain and enforce them.

These rights are termed by the common law *absolute rights*, because they were supposed to be held and enjoyed independently of the government. The people, in giving up a portion of their natural liberty to establish a government, in consideration of receiving the advantages of mutual association and protection, retained these rights absolutely, considering them of so sacred a character that they should never be given up for any purposes whatever.

It has always been most firmly and jealously insisted by our English ancestors that none of these rights could ever, on any pretence, be alienated, taken away, or infringed in the slightest degree, except by their own consent freely given, either immediately or through the medium of their representatives, and then only in the particular mode and manner which they prescribed. Nor was it ever doubted that such was the law; but we find in the history of our race that attempts were frequently made by ambitious

What primary rights did the common law establish ? What were these rights called ? And why ?

kings and others to whom the governmental authority was intrusted, to violate or subvert them.

Such attempts were, however, always resisted, even by force of arms ; and it may with truth be said that every civil war and revolution which has occurred in England for many hundreds of years has been occasioned by tyrannical attempts of kings and parliaments to infringe these great natural rights. Finally, it is well known an attempt of this kind brought on the conflict which resulted in the separation of the American colonies from the parent state.

A keen remembrance of the arduous contests which had been maintained by our ancestors for so long a period in the preservation of these great rights, is quite perceptible in several of the provisions introduced in our national and state constitutions. For though it is clear that no department of government in this country has any power given it to infringe or violate these rights, the framers of our constitutions, and especially of the earliest of them, were not content with merely withholding powers that might be dangerous, but insisted on inserting clauses positively prohibiting such arbitrary and unlawful acts as in their experience they had found so much difficulty in opposing.

The right of *personal security*, as established by the common law, consists in a person's legal right to the uninterrupted enjoyment of life, health, and reputation. As an additional safeguard for the preservation of this right, and in remembrance of oppressions that had been experienced in England, the constitution of the United States provides that the right of the people to keep and bear arms shall not be infringed ; that their right to be secure in their persons and houses against unreasonable searches and seizures shall not be violated ; and that no warrants shall issue but upon probable cause, supported by oath or affirma-

What occasioned the chief wars and revolutions in England ? In what does the right of personal security consist ?

tion, and particularly describing the place to be searched and the persons or things to be seized.

Life, being the gift of God, is a right inherent by nature in every individual, and it follows, as a necessary consequence, that the right to the enjoyment of life includes a right to the means necessary to support it. Thus every individual is entitled to a sufficient portion of the fruits of the earth to preserve life, and no one and no class of persons are entitled to acquire or possess all to the entire exclusion of others. Upon this principle the indigent are supposed to be entitled to a support from the more opulent portion of the community. So, also, every individual is entitled to be protected in the preservation of his health, and from such practices as may prejudice it. And as, in a state of society, the value of life depends much upon the reputation or good name of the individual, he is entitled to protection from slander and detraction.

Next after personal security, the common law regards the right of *personal liberty* as the most important. It consists of the power of locomotion, of changing one's situation, or moving from one place to another, according to one's own free will or inclination.

Many and arduous were the struggles of our ancestors to preserve this right amid the turbulent times and against the tyrannical efforts of the early kings of England. It was not considered firmly established until it was inserted in the great charter, or *Magna Charta*, which, after a long series of bloody contests, Henry III. was reluctantly obliged to sign. That charter declared, among other things, that no freeman should be taken or imprisoned but by the lawful judgment of his equals or by the law of the land.

What consequential rights does the right of personal security include? What additional securities does the constitution of the United States give to this right? In what does personal liberty consist? When and how was it first considered as established in England?

After repeated breaches and as many confirmations of this great charter, King Henry, in the thirty-seventh year of his reign, came to Westminster Hall, where, in the presence of the nobility and bishops, standing with lighted candles in their hands, *Magna Charta* was read. During the reading the king held his hand upon his heart, and at the end solemnly swore faithfully and inviolably to observe all things therein contained as he was a man, a Christian, a soldier, and a king. Then the bishops and nobles extinguished their candles and threw them on the ground, and every one cried, "Let him be extinguished and sink to everlasting perdition who violates this charter;" and thereupon the bells were rung, and all persons rejoiced that this invaluable right had been so solemnly affirmed.

Nevertheless, this solemn oath was but little regarded by Henry or his successors; and it was not until the reign of Charles II., and after the revolution which cost his father his throne and life, that this great right was at last firmly secured by the law called the *habeas corpus act*.

The Latin words *habeas corpus* mean to *have the body*, and the act is thus called because the writ provided for by it, like all other writs in ancient times, was written in Latin, and these were among the words by which it was commenced. It was provided by this act that whenever any person was deprived of his liberty, under any pretence whatever, he should be entitled, as a matter of right and upon his mere demand, to have himself brought before a court or judge, to have the cause of his imprisonment inquired into, and to be discharged if upon such inquiry it was found he was illegally detained.

The writ of *habeas corpus* is, therefore, a writ or written command to the person having another in custody to *have the body* of the prisoner before the court or judge by whom

When was the *habeas corpus* act passed? What is the nature of the writ of *habeas corpus*?

the writ is issued, in order that the legality of his detention may be inquired into. It immediately became and it remains to this day the means whereby any illegal attempt to violate the right of personal liberty may always be defeated; for if any one is unlawfully imprisoned, he need not wait, as in former times, until he is brought to trial or a charge is formally preferred against him, but may instantly cause himself to be brought before some authority competent to decide whether his detention is legal or otherwise.

The confinement of a person in any manner against his will, whether it be in a private house or elsewhere, is an infringement of this right, and such person may always obtain a writ of *habeas corpus* and compel the person detaining him to go before a judge and show his authority for so doing.

This unlawful confinement is so jealously prohibited by the law, that any act which a person is compelled or induced thereby to do, as the entering into a contract, the making a promise of any kind, or the making a confession or acknowledgment, is held to be of no force or validity.

The right of personal liberty has been greatly enlarged and extended by the constitution of the United States, as well as by the constitutions of the several states, which reserve to the people not only the right of unrestrained locomotion, but the perfect freedom of thought and speech on all matters of politics and religion. No law can be made to establish any form of worship or to prohibit the free exercise of any religion which any portion of the people may desire to profess. Neither can any law be made to abridge the freedom of speech or of the press, or the right of the

What security does the writ of *habeas corpus* afford to personal liberty? What is an infringement of this right? What is the effect of a promise or acknowledgment extorted by imprisonment? How has this right been enlarged and extended by the constitution of the United States?

people peaceably to assemble and express their sentiments with regard to any political principles or measure.

The right to *acquire, possess, and transfer property* is the third great natural right which every individual enjoys. It cannot be limited, controlled, or diminished, except under such circumstances and upon such conditions as may be provided by the laws in general.

Not only are all persons entitled to the protection of their property from violation by individuals, but they are equally entitled to such protection against any or all public authorities, except when proceeding by due course of law; and any unlawful encroachment upon the property of an individual may be resisted with the degree of force necessary to prevent it.

Private property may be taken for the use of the public when the public welfare demands it, because the people have consented that the government shall have authority to take it under such circumstances, upon making a fair and just compensation to the owner; but it cannot be taken from one individual for the purpose of giving it to another to be used by that other for his mere private benefit.

All these great personal rights remain, therefore, absolutely vested in the people of this country. They have not been divested of them, and cannot be by any powers they have given either to the state or national governments, except upon the conditions they have themselves prescribed.

But as all persons are equally entitled to these rights, each must use them in such manner as not to interfere with their enjoyment by others. It is necessary, therefore, that the community should have power to make laws to prevent such interference, and to prescribe the penalties which may

What is the third great natural right? To what extent and against whom may an encroachment on the property of an individual be resisted? How and why can private property be taken for the public use?

be thereby incurred. In some cases it is deemed sufficient to secure to the person injured the right to demand compensation of the aggressor; but it has been found from experience that there are certain classes of injuries of an aggravated or atrocious character, which cannot be sufficiently restrained without making them offences or crimes against the whole body of society, and without punishing them by depriving the offender of those rights which he has violated in the possession of others.

All these personal rights may, consequently, be forfeited by the commission of a crime; but here again the national and state constitutions come in aid of the common law to throw additional safeguards around them, and to prevent an individual from being deprived of them upon the mere pretence that they have been thus forfeited. Thus it is expressly declared that the privilege of the writ of *habeas corpus* shall never be suspended, unless when, in cases of rebellion or invasion, it may be necessary for the public safety; that no law shall be passed to punish an individual for doing an act which was not prohibited at the time it was done; that in all criminal prosecutions, the accused shall have the right to a speedy trial, by jury, in his own state, county, or district; to be informed of the nature and cause of the accusation against him; to be confronted with the witnesses for the prosecution; to have process to compel the attendance of witnesses in his favour; and to have the assistance of counsel for his defence. It is also provided that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Again, by the common law, individuals, upon conviction for the commission of certain crimes, not only incurred the

How may these great natural rights be forfeited? What provisions are there made in the constitution of the United States to prevent an individual from being deprived of them on pretence of their forfeiture?

forfeiture of all their rights of liberty or property, but their blood was *attainted*, as it was termed, even in the veins of their children, so that the latter could not inherit any property which would otherwise have descended to them. This cruel mode of punishing the descendants for crimes committed by their ancestors, has been utterly abolished and prohibited by our national and state constitutions.

CHAPTER XV.

OF THE FOUNDATION OF RIGHTS TO PROPERTY.

THERE can be no doubt that the omnipotent and all-wise Creator gave to all created beings the right to use and enjoy the fruits and productions of the earth, whether animate or inanimate, according to their several wants and necessities. Without this right they could not exist, and, therefore, it is clearly inferable that it was intended they should enjoy it.

Thus many of the inferior animals are led by their instincts to appropriate to their use the fruits of vegetation, and even other animals inferior to themselves in strength or sagacity. But man, being far superior to them all, as well from the possession of an immortal soul and the reasoning faculties as from his more advantageous physical conformation, is empowered to acquire dominion over them all, and over all portions of the earth. Indeed, we are told by the Holy Scriptures that, in the beginning of the

What was meant by attainting the blood, at common law? Can that be done in this country? From whence does man originally derive his right to the productions of the earth?

world, God gave to man dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

At the commencement of the existence of man, therefore, the earth, with all things thereon, became his by the gift of God ; but the rights of property which he thus acquired were held in common. That is, the earth and its fruits were not parcelled out in distinct portions to each individual, but the whole was given to all mankind, to be distributed and enjoyed according to their necessities.

The rules by which individual rights to property are regulated result from the customs and institutions of civil society. They have been established by degrees, and vary materially among different nations or societies of people. They even vary, in some respects, in the different states of the Union—the power to regulate the acquisition and possession of property being withheld from the general government, and left exclusively to the governments of the several states.

The necessity for a division of property, or the acquisition of individual rights to it, would seem to manifest itself at the very instant when men begin to associate together, and to increase at every step taken in the arts of society and civilization. Thus, if man be considered as in a state of nature, he would experience a necessity for food and shelter ; and whatever articles suitable for those purposes he should find unappropriated by others he would have a natural right to appropriate to his own use. Having then so appropriated them, it would be contrary to natural reason and justice to take them from him by force ; and for the sake of preserving peace and harmony among men living in the

How were the rights of property held at the commencement of man's existence ? From what do the rules regulating individual claims to property result ? Are they uniform or various ? How does the necessity for a division of property manifest itself ?

same vicinity, it would be found necessary to establish a rule that he should be entitled to use such articles without hinderance or molestation from others. Thus we find the first origin of private rights to property in *occupation*, or the appropriation of things that had before been unappropriated by any one.

By degrees, men, as they increased in numbers and in wants, may be supposed to have become desirous of providing for their future as well as their immediate necessities; or, in other words, to accumulate such articles as in reality or in imagination would become useful to them. This desire of accumulation all civilized nations have judged it wise to encourage and protect; for otherwise there would be little chance of improvement or the amelioration of society. If one should have no right to his habitation except while being actually within it, and another might take possession the moment he stepped out, there would be no motive for his exerting himself to provide any thing more than a mere temporary shelter; and so with regard to all other things.

The right of accumulation then being established, it would follow, as a natural consequence, that the owner would desire to have the privilege of either using his property himself or of transmitting it to others, as he might think proper; and this right, also, has been given in all civilized nations. From the exercise of this last mentioned right has resulted all the rules regulating the interchange of property among men; and it forms the basis of the most common mode of obtaining private property; namely, by the lawful acquisition of the rights of other persons, who, previous to such acquisition, were in the rightful enjoyment of it.

What is the motive for encouraging the right to accumulate property? Upon what right are the rules regulating the interchange of property founded?

Among populous and civilized nations, by far the greater proportion of property is acquired in this last-mentioned way; for it will be found that human enterprise and industry have already appropriated almost all the valuable articles that remain entirely unappropriated and subject to be acquired simply by occupation. In this country, even the wild unimproved lands, and, consequently, the minerals and other valuable articles in and upon them, belong either to individuals or to the government; and almost the only subjects of the right of property that remain unappropriated are the wild beasts of the forest, the wild birds of the air, and the fish and other contents of the seas and water-courses.

Whenever an individual, either by the first occupation of it, or by acquiring the rights of others through any act of theirs disposing of their rights to him, obtains the right to property, he is said to obtain it by *purchase* or *conquest*—the latter word having been sometimes used, in early times, as synonymous with the former.

As men advanced in their notions relative to property, a further step was taken, and it was determined that individuals should not only have the right to dispose of their property, but that, if during life they should omit so to do, it should, by the mere operation of law, descend to their children or other relatives, who were consequently called their *heirs*. This mode of acquiring property is termed its acquisition by *descent*.

Thus, as the modes of acquiring property by the original occupation of it, and by the acquisition of the rights of others through the voluntary acts of such others, are both

By what mode is the greater portion of property acquired in civilized nations? What are the two primary modes of acquiring property termed? When is property said to be acquired by purchase? When by descent? What are the persons to whom property descends by the mere force of law called?

considered acquisitions by purchase, there are but two primary modes of obtaining property known to the law, which it is necessary to distinguish ; namely, by *purchase* and by *descent*. The first includes all the modes by which it can be transmitted from one person to another, by will, deed, or other act of the parties. The second embraces only those cases where, by the mere force of the law, and without any act of the parties, one person acquires a right to property as the heir of another.

CHAPTER XVI.

OF THE SUBDIVISION OF THE OBJECTS OF PROPERTY.

As the rights to private property treated of in the preceding chapter came to be generally recognised and protected by the laws, it may be supposed that each individual became possessed of some property, which he could use or dispose of at his own will and pleasure. But supposing that all the objects of property were originally parcelled out in this manner, and that each individual had the sole and exclusive right to his portion, it would soon result that in transmitting their rights from one to another, one person would be disposed to transmit only a portion of his property, another to transmit his for a limited time only, and another to impose on the transmission of his certain limitations, conditions, or restrictions.

Hence, it soon became necessary to give certain definitions as well to the objects of property as to the rights or interests therein which could be transmitted from one to another, in order that the rights held by each person might

be understood. Otherwise, such rights, after they had passed from one to another through a great number of owners, with such changes and qualifications as each should be disposed to make, would have been involved in inextricable confusion.

The objects of property are first divided into two classes, denominated *personal property* and *real property*. This division is necessary because there are peculiar characteristics which occasion a difference in the rules of law applicable to each class.

Personal property consists of such articles as are movable, and may attend the owner's person wherever he goes, such as money or goods. Real property consists of such things as are permanent, fixed, and immovable, and is usually said to be comprised under the terms *lands*, *tenements*, and *hereditaments*.

The term "land" comprehends, in its legal signification, any ground, soil, or earth, and all buildings or improvements thereon of a fixed and permanent character. Sometimes, however, buildings or improvements of an apparently permanent character will be excepted from the rule that they should be considered part of the land, in consequence of some peculiar circumstances under which they were placed upon it.

Thus, if the owner of land transmit to another the right to use it temporarily for the purpose of carrying on some trade or business, it will be inferred that permission was given to the latter to erect such structures as were necessary for that purpose, and to remove them when his right to occupy the land expired. Consequently, if, while the land is so occupied, the owner transmits all his rights to a

Into what primary classes are the objects of property divided? Give a definition of personal property. Of real property. What does the term land comprehend? What exception is there to the general rule that this term embraces every thing of a permanent character?

third person, the latter will not obtain a right to the buildings or fixtures so erected, because they will be regarded as the personal property of the temporary occupant; though, if the owner had himself erected them, they would have been included in the transfer as a part of the land.

This term has also an indefinite extent upward as well as downward, and includes not only the face of the earth, but every thing under it or above it. Consequently, no one has a right to erect a building to overhang another's land, nor to undermine it by excavations in the bowels of the earth.

The word "tenement" is said to be of still more extensive signification, as it includes every thing which may be holden, provided it be of a permanent nature. In speaking of a person having rights to real property, the term *tenant* is frequently employed. It signifies one who is the *holder* of such rights.

But the term "hereditament" is a still larger and more comprehensive expression, for it is understood to include not only lands and tenements, but every thing which may be *inherited*, whether the thing be some corporeal and tangible substance, or something which is not corporeal or perceptible to the senses. Hereditaments are, therefore, said to be of two kinds; namely, *corporeal* and *incorporeal*. The first kind consists of substantial and permanent objects, and are, therefore, comprehended under the terms "land" and "tenements." An incorporeal hereditament is some right which issues out of or is annexed to something corporeal, such as a right of way, an office, a pension, or the rent of some corporeal thing.

What extent has this term upward and downward? What is meant by the term *tenement*? By what term is the holder of rights to real property called? Why is he so called? What does the term *hereditament* include? What is a corporeal hereditament? What is an incorporeal hereditament?

CHAPTER XVII.

OF THE SUBDIVISION OF RIGHTS TO REAL PROPERTY.

IN England, as well as in all countries where the feudal system was adopted during the Middle Ages, all lands were supposed to be held in virtue of their original occupancy by some superior, and granted to the immediate possessors on condition of their rendering him service. Therefore, the land was never strictly and absolutely the property of the occupant, since it was held of a superior lord, in whom the ultimate property resided. The allotments of land made by the lord to his vassals or feudatories, were called feuds, fiefs, or *fees*; and hence the word *fee* was commonly used by the English lawyers to signify the right or the grant by which land was held.

In this country, all the rights to the soil derived from its original occupancy belong to the government, by whom it is sold or parcelled out to individuals. When so disposed of, however, the government retains no right to it except that of *eminent domain*, as it is called, by virtue of which the governments of the several states have the power to pass laws for the general regulation of the rights to property situated within their limits, and even to require the private owners to give up their lands for the public use, upon receiving a just compensation therefor, when the public good requires that they should do so. In all other respects, the person to whom land is first given by

How were lands allotted to the immediate possessors during the Middle Ages? How did the word *fee* come into use? To whom does the right to the soil, derived from its original occupancy, belong? When disposed of to private individuals, what rights are reserved?

the government acquires an absolute and unconditional right to it. He may dispose of it to whom he pleases; and if, during his life, he makes no disposition of it, it descends to his heirs at his death.

In England, when a feud or fee was granted to an individual, without any condition as to the manner in which it should be held, or any limitation as to the time during which it was to be enjoyed, it was called a simple fee, or *fee simple*, because it was not clogged with any conditions or restrictions. For the same reason, and because by its general use for a long period of time its meaning has become well understood, the term *fee simple* is still used, both in England and in this country, to express the rights of individuals to land when they are of that simple and unlimited character.

The right to hold land in fee simple means, therefore, in law, the right to possess it absolutely, subject only to the government's right of eminent domain, and to dispose of it at pleasure. If the person entitled to it does not dispose of it during his life, it descends to his heirs, who also have the same right to dispose of it or to suffer it to descend to their heirs; and thus if no one, while in the enjoyment of it, should by any act of his transmit it in a different direction, it would descend from the first possessor to his heirs, and so from heir to heir to the end of time.

If, indeed, in the course of its descent, it should be in the possession of one dying without heirs, as an alien, for instance, it would be at an end. It would then be said to *escheat*, which is a French or Norman word denoting an

What rights are acquired by the person to whom land is first given by the government? When, in England, a feud or fee was given to an individual without any restrictions, what was it called? Why was it so called? Why is the term *fee simple* still used in this country? What does that term mean? If the owner does not dispose of it, what becomes of it? What is an *escheat*, and when does it occur?

obstruction to the descent; and the land would fall back to the original grantor of it—or to the state, in this country, because there would be no private individual who could set up a valid claim to it.

A fee simple is, therefore, the most unlimited right to real property, as to duration or extent, that can possibly be given to private individuals; and it will be perceived that, having been once granted, it can never come back to the government by the operation of law, unless it meets with such an interruption as is above mentioned. Consequently, it must always be in existence; and it can never be destroyed or cut off so long as there is any person in being who is capable of inheriting or holding it. It may, however, be divided into parts, or rather rights of less extent may be cut out of it and held by different persons; but, however many parts may be thus carved out of it, the remainder of the right still exists, and must belong, either conditionally or unconditionally, to some one.

It is to be understood, then, that all lands in the possession of private individuals have attached to them, in law, a fee-simple right, which may belong wholly and unconditionally to a single individual, or it may belong to an individual conditionally, or it may be parcelled out and divided among several individuals, each holding one or more parts of it. It is this method of transmitting a fee simple unconditionally, or with conditions attached to it, and of cutting it up and transmitting different parts of it to different persons—which will be further illustrated in the next chapter—that gives rise to the subdivisions of the rights to real property, as to their duration, that have been made for the purpose of distinguishing the different kinds of rights that may be held by the various owners.

How can a fee simple be terminated or destroyed? May or may it not be divided into parts, and how? Is or is it not attached to all lands, and how may it be held?

CHAPTER XVIII.

OF ESTATES CLASSED ACCORDING TO THEIR EXTENT AND DURATION.

WHATEVER rights an individual may possess are termed his *estate*, a word that is commonly used when the interest of the person owning rights to property of any kind is intended to be designated. It signifies the condition or circumstances in which the owner *stands* with respect to the property. If he has a right to the whole fee simple, he is said to have a fee-simple estate, or an estate in fee simple. If he has a lesser right, he is said to have an estate such as the right he does possess imports.

As has been shown in the previous chapter, an individual who has a fee-simple estate, instead of transmitting it entire and unrestricted as he himself holds it, may transfer it to another with qualifications or conditions. This would happen if he should, for instance, sell the land upon the condition that the purchaser and his heirs should always reside upon it. Here the estate might by possibility remain for ever in the purchaser and his heirs; but upon his or their failure to comply with the condition, it would be at an end, and the land would fall back to the person who sold it upon that condition, or to his heirs. Such an estate as the purchaser would have in such a case as this, is called at common law a *qualified* or *base fee*, because its duration depends upon circumstances which qualify or lessen its value.

What is an estate? When is that term used? What does it signify? What is the nature of a qualified fee? Give an example of one.

The owner of an estate might also, by the common law, transmit it with such restraints that it could only descend to some particular heirs, as to the male heirs or the female heirs of the purchaser, or the oldest male heir and his oldest male heir, &c. An estate thus restrained is called a conditional fee, because it could only continue upon the condition that there should be such particular heirs. Upon the failure of such heirs the estate expired, and the land fell back to the person who transmitted it with such conditions. From this species of fee originated the system of *entailment*, much used in England for the purpose of preventing the landed property of families from being split up into small portions.

Limited and fettered estates of this character were found very inconvenient in England, and they gave rise to many statutes by which they were regulated, and by which means were afforded for removing the restrictions, or for evading them, in some instances. In this country they are much discouraged, on grounds of public policy. In most, if not all the states, provision is made by statute laws to prevent the entailment of estates for more than a very limited period of time.

If the owner of the fee simple should transfer his lands to A, to be holden by him during his life, or during the life of the grantor, or during the life of any third person, or during the lives of more persons than one, A would have what is called an *estate for life*. There are, indeed, some estates for life which may be terminated before the life for which they are created expires ; as, if an estate should be granted to a woman during her widowhood, upon her mar-

What is a conditional fee? Give an example. What is the object of entailments? How are fettered inheritances regarded in this country? To what extent are they prohibited? What is an estate for life? Give some examples. Can such an estate expire before the life for which it is created?

riage the estate would be at an end ; yet it is considered an estate for life, because the time for which it may endure being uncertain, it may last for her life, if the contingency upon which it is to be put at an end does not sooner happen.

All these estates—that is, estates in fee simple, in a qualified fee, in a conditional fee, and for life—are called *freehold* estates, because they are to endure for an indefinite length of time, and can only be terminated by the death of the person during whose life they are to be enjoyed, or by the free and voluntary act of the holder. The owners of all such estates have a right to the full enjoyment and use of the land, and all the profits of it ; but the owner of an estate for life only, has not the right to destroy or waste the premises by cutting down timber unnecessarily, or by consuming such things as are not the temporary profits of the land, and are not necessary for his complete enjoyment of his estate, but the loss of which tends to the permanent injury of the premises.

This restriction as to the rights of the owner of an estate for life only, is the consequence of the fact that all the rights which attach to the land do not belong to him, and he ought not to be permitted to injure or destroy that which belongs to another. As has been before shown, the entire fee simple still subsists, and there is always an owner for that portion of it which does not belong to the immediate possessor. If the last owner of the whole fee simple only granted away a life estate to the person in possession, he still remains the owner of the balance of the fee. He has, therefore, an estate in the land, as well as the owner of the life estate ; and his is called an estate

What kinds of estates are freehold estates ? Why are they so called ? What rights to the use of the land do the owners of such estates enjoy ? What restriction is there as to such rights when there is only a life estate ? What is the reason of that restriction ?

in reversion, because, though not entitled to the present possession of the premises, they will *revert*, or come back, to him as soon as the life estate is at an end.

If he has transferred or granted the lands to be holden by A during his life, and then by A's son or children in fee simple, A would have an estate for life, and A's son or children would have what is called an estate *in remainder*. In this instance a portion of the fee is cut out and given to A, while the balance or remainder of it is reserved for his son or children. Here the fee is divided into two portions only, but on the same principle it might be divided into any number of parts; and if what was left, after all the particular estates thus cut out should come to an end, was given to any person, such person would have an estate in remainder. If such balance or remainder of the fee was not granted away at all, it would still belong to the original owner of the fee simple, and be an estate in reversion.

Of estates less than freehold, there are said to be three varieties; namely, estates *for years*, *at will*, and *by sufferance*.

An estate for years is created when the possession is granted to the tenant for some certain and determinate period. Every estate which must expire at a period certain and prefixed, is regarded as an estate for years. Such estates are usually created by lease; and it is a common practice to insert agreements regulating the right of the tenant to the profits of the land.

When there is no such agreement, it is said there is this

How may an estate in reversion occur? What is an estate in reversion? Why is it so called? How can an estate in remainder be made? Why is it so called? Give an example of an estate in remainder and an estate in reversion. What varieties are there of estates less than freehold? Define an estate for years. How is such an estate usually created?

difference, at common law, between the rights of a tenant for years and one having an estate for life, that if the former sows a crop which cannot ripen until after that season of the year when the lease terminates, it will belong to the landlord; for the tenant knew when his lease would expire, and it was his own folly to sow what he could not reap. But in the case of a tenant for life, the estate not being to expire at a foreknown time, but by the act of God, his administrators are entitled to harvest and gather the crops sown by him. But it is not so, even in this latter case, if the tenant for life terminates the estate by his own act, or does any thing that amounts to a forfeiture of it.

An estate at will is when one person lets lands or tenements to another, to be held during the pleasure or will of the former. In this case, also, if the tenant does not himself determine the lease, he is entitled to the crops growing when the lessor ends the estate and puts him out, because the tenant could not know when he would be put out, and could make no provision against it.

An estate at sufferance is when one comes into possession of land lawfully, but keeps it afterward without having any right to do so. A common instance of this is where the possession was acquired by a lease for a determinate period, and after that period has expired the tenant continues to keep possession without any new lease or permission of the owner. This estate may be destroyed whenever the owner shall take possession of the premises and turn the tenant out. Before doing this he cannot treat the tenant as a trespasser; because, the tenant being once in by lawful means, the law will presume he remains

What difference is there between the rights of a tenant for life and a tenant for years, as to the use of the land? Define an estate at will. What are the rights of the tenant? Define an estate at sufferance. How may such an estate be terminated? Why may not the owner treat the tenant as a trespasser?

in by consent of the owner, unless such owner makes it manifest that his continuance was unlawful.

If, in such a case, the landlord can get possession of the premises without committing a breach of the peace, he is at liberty to do so ; but as no one is allowed to redress his private wrongs by force, if force is necessary he must resort to the due process of the law.

CHAPTER XIX.

OF OTHER CONDITIONAL ESTATES.

BESIDES the several species of estates which have been mentioned, there is another, which is usually called *estates upon condition*. These are such as depend upon the performance of some condition, or the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or entirely destroyed.

Such condition may either be *implied* from the nature of the estate or the grant of it, or it may be *expressed* in the deed or instrument whereby the estate is granted. An instance of the first kind, or of a condition that arises by implication as a necessary consequence of the nature of the estate, is where an office is granted to a man generally, without prescribing rules for his conduct. Here, the law tacitly annexes a condition that he shall faithfully perform

When may the owner take possession of the premises without resorting to the aid of the law ?

What is the nature of those estates usually called estates upon condition ? How may the conditions be ascertained ? Give an instance of an estate held upon an implied condition.

the duties of his office ; and if he fails to do so, it may be taken from him and given to another person.

A condition expressed or stipulated in the grant itself, or in the agreement between the parties to the transfer of the estate, may be either *precedent* or *subsequent*. Precedent conditions are such as must happen before the estate can vest or be enlarged. Thus, if an estate be given to A upon condition that he enters into a marriage with B, the marriage is a condition precedent ; and until that happens, A does not acquire any right to the estate. So, if one grants to another a lease for years, and also the fee simple if he shall pay a specified sum within a certain period, the payment of such sum is a condition precedent ; and the estate will not be enlarged until it is paid in accordance with the agreement.

If the condition is subsequent, the estate is immediately vested ; but its *continuance* depends upon the performance by the person to whom it is transferred of the thing stipulated to be done by him, or the non-performance of the person transferring the property, if the condition is that the grant shall be defeasible by the performance of some act on his part.

One of the most common instances of an estate granted upon a condition subsequent, is that created by a *mortgage*. This is usually a conveyance or deed in the common form, with a condition appended to it specifying that upon the payment of a certain sum, due from the person making the deed, who is called the *mortgagor*, to the person to whom it is made, and who is called the *mortgagee*, the deed shall be void and of no effect.

Here, according to the words of the deed, the property mortgaged would become the property of the mortgagee

What is a precedent condition ? Give some examples. What is a subsequent condition ? What is the most common instance of a condition subsequent ? What is the form of a mortgage ?

absolutely, upon the failure of the mortgagor to pay the sum named when it became due. But this is one of the cases in which the principles of equity have been applied, to relieve the mortgagor from the strictly legal consequences of what would often prove to be a very hard bargain on his part.

By these principles it has been established that inasmuch as a mortgage is usually given to secure the debt specified in it, it is to be considered as a security for such debt, and not a conveyance of the property, intended to take effect absolutely on the failure of the mortgagor to pay the debt at the time agreed upon. And, furthermore, that as property of great value is frequently mortgaged to secure comparatively small sums, it is unconscionable to permit the mortgagee or creditor to take it in payment, without allowing the debtor a reasonable time to redeem it even after his debt falls due. It has, therefore, been determined, and such is now the established law, that a mortgagor may, after his debt becomes due, call upon the mortgagee, if he is in possession of the property, to deliver it back and account for the rents and profits, on payment to him of his whole debt and the interest that has accrued upon it.

This right of the mortgagor is called his *equity of redemption*; and this equity of redemption is, in fact, an estate, which he retains, and which he may mortgage a second or more times, or sell absolutely, in the same manner that he could have mortgaged or sold his whole estate before the first mortgage was made. Consequently, if a man purchases, of the mortgagor, property which has

What is the strictly legal effect of the words of a mortgage? How has that effect been modified? What is a mortgage considered by the rules of equity? What right does these rules give to the mortgagor? What is that right called? What power has the mortgagor to dispose of it?

previously been mortgaged, he acquires the same estate or right which the mortgagor had; namely, an equity of redemption, or the right to have the property clear of the encumbrance upon paying off the mortgage.

But, on the other hand, the mortgagee may, when the debt is due, call upon the mortgagor and any persons to whom he may have subsequently mortgaged or sold his equity of redemption, to redeem the estate presently, or in default thereof to be for ever *foreclosed* or barred from redeeming it. If, upon proceedings for this purpose, the debtor, or those to whom he may have transferred his rights, fail to redeem by the payment of the debt, the property is ordered to be sold for the payment of it; but if, upon such sale, there is any overplus, or the sum for which it is sold amounts to more than the debt, the debtor, or those who may have acquired his rights, is entitled to have what may remain after the mortgage debt is satisfied.

After a mortgage is executed, the mortgagee is said to have the title to the property, and the mortgagor only his equity of redemption. Therefore, the mortgagee may take immediate possession; or if there be a tenant on the premises paying rent, he may require the rent to be paid to him. Still, his title always remains defeasible until after foreclosure, and he may be called upon to account for such rents in part payment of the debt.

This mode of securing debts by mortgage is quite common in this country; and in many of the states there are statute laws varying the effect of mortgages, and the

If he disposes of it what rights do those to whom he disposes of it obtain? How is the mortgagee to enforce payment of his debt? What is the course of proceedings for that purpose? If the property is sold in the course of such proceedings, how are its avails disposed of? When a mortgage is executed, who has the title to the property? What is the consequence of the change of title? Are the laws as to the effect of mortgages, and the modes of foreclosure and redemption, uniform in the several states, or are they not?

modes of foreclosure and redemption. Thus, in some states, the mortgagee is not allowed to take possession of the property unless the mortgage contains an express stipulation that he shall be at liberty to do so.

CHAPTER XX.

OF ESTATES CLASSED ACCORDING TO THE NUMBER OF THE OWNERS.

WITH respect to the number and connections of the owners, estates are said to be held in severalty, joint-tenancy, coparcenary, and in common.

An estate *in severalty* is where one person is the sole tenant or owner, without any other person being joined or connected with him in the ownership.

An estate *in joint-tenancy* is where two or more persons hold an estate by the same conveyance or title, having the same interest, commencing at the same time, and the same undivided possession. A joint estate is, therefore, said to have four essential *unities*; namely, unity of *interest, title, time, and possession*. The most important incident to this kind of estate is the right of *survivorship*, by which, on the death of any one of the joint tenants, his interest or share remains to the survivors and does not go to his heirs. The last survivor, therefore, becomes entitled to the whole estate. A joint-tenancy is always created by

How are estates classed with respect to the number of their owners? What is an estate in severalty? What is an estate in joint-tenancy? What are its essential unities? What is its most important incident? How is such an estate created?

the act of the parties and never by the mere operation of the law.

Estates in *coparcenary* seldom or never occur in this country. They arise, under the common law, in England, where lands descend from an ancestor to two or more persons. They resemble estates in joint-tenancy in having the unities of interest, title, and possession, but it is not necessary that there should be a unity of time; and, therefore, parceners have not an *entirety* of interest, and there is no right of survivorship.

An estate *in common* is where two or more persons hold property by unity of possession only. That is, the titles, the shares or proportions of the tenants, and the time during which their shares are to be enjoyed, may all be different and distinct. This species of estate is much more common in this country than either of the two preceding kinds. Indeed, there are statute laws in several of the states declaring that when estates descend to heirs. and in almost all cases when property is held by several persons, they shall be considered tenants in common.

Tenants in common having a unity of possession have, consequently, the same right of possession. That is, any one of them has the same right to the possession of the whole premises that any of the others have. No one has any right to appropriate the whole to himself, or to eject or turn out another; and each one is liable to the others for any waste or injury he may do to the property, and for any proportion of the profits over and above his share, which he may have received.

As there is no entirety of interest, there is no right of

What is an estate in coparcenary? What unities has it? What is an estate in common? Which of these kinds of estates are most common in this country? What statute laws are there in this country bearing upon them? What right has a tenant in common as to possession? As to sole enjoyment? As to waste or profits?

survivorship ; and upon the decease of either of the tenants in common, his share does not belong to the others, but to his heirs. Any person having a right to property as a joint-tenant with others, may, at his pleasure, demand a partition, and so have his portion set off to him in severalty. The mode of obtaining such partition is regulated by statutes, which vary somewhat in the several states.

CHAPTER XXI.

OF PERSONAL PROPERTY.

THOSE things which are personal property are technically called *chattels*, a word signifying goods. The name used to distinguish this species of property was adopted to signify their movable character, or capability of being moved or carried about with the owner's person. There are, however, some rights of property arising out of lands, such as leases for years, which in the eye of the law are not deemed equal to those rights which concern real property ; and they are, therefore, classed with and are governed by the same rules as personal property.

One may acquire personal property in all inanimate things, such as goods, plate, money, jewels, or garments. Also in all vegetable productions, such as fruit, grain, and all the parts of a plant or tree when severed from the

What right has a tenant in common as to survivorship ? As to having a partition ?

What are the objects of personal property technically called ? What things are there in connection with lands that are regarded as personal property ? In what inanimate things may personal property be acquired ? In what vegetable substances ?

ground. But all vegetable productions while growing or attached by their roots or natural ligaments to the soil, are, by the common law, considered a part of the *realty*, and belong to the owner of the land. This distinction should be kept in remembrance; for though the statute laws have made some changes in this respect, and growing plants are now sometimes and under peculiar circumstances regarded as personal property, as a general rule they are not.

A like property may be held in animals of a tame and domestic nature, such as horses, sheep, poultry, and others, that are supposed to be of intrinsic value as serving for food or labour. There is a class of animals in which, by the common law, there could only be a qualified or incomplete property; and this includes those capable of being reclaimed by art and education, so as to become partially tame and unable to escape and use their natural liberty. Such are dogs, cats, bees, deer, rabbits, pigeons, and the like. These were supposed to be of a wild nature, and usually at liberty; wherefore they were no longer the property of a man than while they were in his keeping or actual possession. This distinction has, however, been gradually lessened, until it is now subject to so many exceptions, that property in those kinds of animals may be considered almost as absolute and perfect as in any others that man by art and ingenuity has subjected to his use.

Personal property is said to be either *in possession* or *in action*. It is in possession when it is in the actual occupancy of an owner; and in action when a man has

When are vegetables personal property? When real property? In what animals may property be acquired? In what kinds of animals could there be only an imperfect property at common law? What was the extent of that imperfect property? Has there been any change in the law in that respect, and what? How may personal property be situated as to the possession?

not the occupation, but merely a right to have the thing in question, and may obtain it by means of an action or suit at law. Hence, the thing so recoverable is called a thing or *chose* in action. Thus, a debt due, or money payable by a note or bond, is a *chose in action*, for it is not in the possession of the person to whom it is due, but he has a right to have a suit or action for it if it be not voluntarily paid.

CHAPTER XXII.

OF THE ACQUISITION OF PROPERTY BY OCCUPANCY.

It has already been stated that the original and primitive mode of acquiring a right or title to property was by occupancy. As there are still some instances in which rights acquired by this means are recognised, they will now be briefly noticed.

Whatever movables are found on the surface of the earth or in the seas or watercourses, and are not claimed by any owner, or have been voluntarily cast away and abandoned by the last proprietor, may be appropriated by the finder or first occupant.

The accidental loss of any article does not deprive the owner of his right of property, and he may reclaim it of

When is personal property in possession? What is a right to personal property not in the possession of the owner called? Give an instance of a chose in action.

In what movables may a right of property be acquired by occupancy? What is the effect of the accidental loss of an article, as to the right of property?

the finder; but there are some instances in which he may be prevented from making such reclamation, by his omission to do so within a reasonable time. Thus, if he should afterward see the property in the possession of another, under circumstances that might reasonably induce the latter to suppose it was abandoned, and upon that supposition was endeavouring to increase its value by his labour or the expenditure of his money, the omission of the owner to give timely notice of his rights would be considered equivalent to a manifestation of his intention to abandon them to the person in possession.

Upon the same principle, namely, that one may abandon his rights simply by an omission to assert them at a proper season, the public do, sometimes, by occupation, acquire a right to the use of private property. Thus, if a road or street be established across the land of an individual, and it continue to be used as such and worked upon and improved by the public authority for a great number of years, it will be considered that his neglect to enclose the land or to make any objection for so long a period, is sufficient proof that he had dedicated or given a right to the public to use it for such purposes.

The benefit of light, air, and water may sometimes be appropriated by occupancy. Thus, if I have a house, and another person erects buildings for a manufactory, which, by giving rise to noisome vapours, or by other means, destroys the salubrity of the air or other elements necessary to the enjoyment of my property, I may require him to desist from making the nuisance; but if he is first in possession of the air, and I voluntarily fix my habitation near him, the nuisance is of my own seeking, and I cannot re-

How may one abandon his rights by an omission to assert them? How may the public acquire a right to the use of private property by occupation? How, and under what conditions may the benefits of light, air, and water be appropriated?

quire him to remove it. In cities or other densely populated districts, however, certain kinds of trades are sometimes prohibited from being carried on within prescribed limits, on the ground that the public welfare demands such sacrifice of individual interests. So, if a stream be unoccupied, I may erect a mill and detain the water, but not so as to injure a neighbour's prior mill; for he, by the first occupancy, has acquired a right to so much of it as was necessary for his purposes.

It is generally admitted that any person has the natural right to pursue or take any wild fowl or insect, any fish, beast, or reptile, that is not tamed or domesticated; and this right exists, no doubt, except in those cases in which it is restrained by the statute laws. But no one has a right to intrude upon the enclosed land or premises of another for these purposes, or upon places to which an exclusive right is given by law to individuals, such as fisheries to which private rights have been acquired.

It is said that any one may seize and take to his own use the property of an alien enemy, or subject of a government with which the government of the taker is at war. It is upon this principle that goods and vessels are taken as prizes, in time of war, upon the high seas. This right is, however, subject to several restraints by the statute laws of the country, by treaty stipulations in some cases, and by the laws of nations.

The right of capture is, in general, confined to such captors as are commissioned by the government of the United States; to which, as we have before seen, the power is given by the constitution to grant letters of marque and reprisal, and to make rules concerning cap-

What rights have all persons to pursue and take wild animals? What restraints are there upon such rights? Upon what principle is it that the goods and vessels of an enemy may be taken as prizes? Who may be captors?

tut's on land and water. It is also confined to such goods as are found under the protection of the enemy's flag, or in some place in the possession of or under the control of the government of the enemy. When a foreigner is residing in this country, and a war arises with his nation, his goods are not liable to be seized; nor are they so liable when within the jurisdiction of another and friendly nation. Indeed, it has been much questioned, especially of late years, whether the private property of individuals should be subject to seizure on this ground.

The acquisition of property by *accession* is also said to be founded on the right of occupancy. Thus, if any corporeal substance receives an accession from natural or artificial means, as by the growth of vegetables, or the fashioning a material by art and labour into ornamental or useful articles, the original owner of the thing is, by his right of possession, entitled to it under its state of improvement. Consequently, if another person make such improvements, except under circumstances warranting the supposition that it had been abandoned to his use, he will not thereby acquire any right to it.

This distinction is, however, here to be observed—that if the thing itself be totally changed into a thing of a different species, as by making wine, cloth, or furniture, out of another's grapes, cotton, or lumber, it will belong to the person making such changes, who can only be required to make satisfaction to the former owner for the materials so used by him. But where one person wilfully mixes his goods with those of another, as his grain or flour, without the consent of the other, and so that the proportion belonging to each cannot be distinguished, the

Where must the goods or vessels be situated? How is property acquired by accession? If one person makes improvements or accessions to an article belonging to another, to whom will the article belong? What distinction is there to be observed as to this rule?

common law gives the entire property to him whose original dominion was invaded and thus rendered uncertain.

The right which an author or artist may be supposed to have in any literary composition, as in any original book, painting, engraving, or useful invention, is also founded upon this species of right. The ground assumed is, that when a man by the exertion of his mental powers has produced a novel or original work, he has as clear a right to it and to dispose of it as he pleases, as in the case of any work of mere mechanical skill. In the case of a literary composition, as its identity consists of the sentiment and language, the same sentiment and language in the same words is considered the same composition, however it may be multiplied by writing or printing. So, the identity of an invention consists in the novel and original application of some principle of art or science to a useful or profitable purpose; and the application of the same principle to the same purpose must always be a use of the same identical thing.

CHAPTER XXIII.

OF THE ACQUISITION OF PROPERTY BY DESCENT.

It has been already mentioned that it has become the established law in all civilized countries, that if a man possessed of property, either real or personal, or both, die without having made any disposition of it during his life, it descends or passes from him at the instant of his death to

What is the consequence when one wilfully mixes his goods with those of another? How are the rights of authors or inventors to have the exclusive use of their productions explained?

What becomes of the property of a man after his decease?

those persons who, by the particular laws or customs of the country in which he lived, are entitled to succeed to his rights.

Descent, or hereditary succession, is, therefore, the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his lawful heir. An *heir* is he upon whom the law casts an estate immediately upon the death of the ancestor; and an estate so descending to the heir is called an *inheritance*.

It is also the case in all civilized countries, that the laws regulating the descent of such inheritances, and pointing out the persons who are entitled to be considered the lawful heirs or *heirs at law* of a deceased ancestor, are founded chiefly on the relationship or *consanguinity* of persons having a common origin from the same ancestor, and who are therefore said to partake of or share his blood.

Consanguinity is either lineal or collateral. *Lineal consanguinity* is that which subsists between persons, of whom one is descended in a direct line from the other. The line may also be either ascending or descending; as, if we suppose John Doe to be the owner of an estate, his father and grandfather are lineally related to him in the *ascending line*, and his children and grandchildren in the *descending line*.

Collateral consanguinity exists in persons descended from the same common ancestor, but not descended one from another. If John Doe had several sons who had each several children, all these children would be related to each other by collateral consanguinity; for though not

What is descent? What is an heir? What is an inheritance? On what are the laws of descent chiefly founded? What is consanguinity? What kinds of consanguinity are there? What is lineal consanguinity? How does it ascend or descend? What is collateral consanguinity? Give an instance.

descended one from another, they would all be descendants of John Doe, their common ancestor, and would each have a portion of his blood in their veins.

The *degrees* of lineal consanguinity are reckoned by generations. Every generation constitutes one degree, reckoning either upward or downward. Thus, the father of John Doe is related to him in the first degree, and so is his son ; his grandfather and grandson in the second ; his great-grandfather and great-grandson in the third, &c.

The degrees of collateral consanguinity are ascertained by beginning at the common ancestor and reckoning downward. Thus, John Doe and his brother are related in the first degree, because from the father of both to each of them there is but one generation. John Doe and his brother's son are related in the second degree, because the nephew is two degrees removed from the common ancestor ; namely, his own grandfather and the father of his uncle.

The number of ancestors which every one has within no very great number of degrees is very great. He has two in the first degree of the ascending line—his own father and mother ; four in the second—the parents of his father and mother ; eight in the third ; and, by the same rule of progression, he has one thousand and twenty-four in the tenth, and more than a million in the twentieth.

The increase in the number of collateral kindred in the descending lines is still more rapid. If we suppose two brothers to have each left two children, each of those children two more, these last two each, and so on, two for each person in every generation, there will be in the fifth

How are the degrees of lineal consanguinity reckoned? Give some examples. How are the degrees of collateral consanguinity ascertained? Give an example. What number of ancestors has one in the first, second, third, and tenth degrees? How do the number of collateral kindred increase?

generation 256 ; in the tenth, 262,144 ; in the twelfth, 4,194,304 ; and in the twentieth, 274,877,906,944.

But although, in almost all countries, the laws regulating the descent of property are founded on the relationship which may have existed between the deceased person and those who survive him, the laws of different countries differ widely in the rules by which the persons so related by consanguinity are preferred one to another, in their rights to have or to share the inheritance.

By the common law the descent of property is regulated by a series of rules derived from the canon law, and called *canons*. The first of these rules is, that inheritances shall lineally descend to the issue of the person who last died in possession of the property ; and to the issue of such issue, so long as there shall be issue in this line of descent ; but shall never lineally ascend. The second is, that the male issue shall be admitted before the female. The third is, that where there are two or more males in equal degree of consanguinity, the eldest only shall inherit ; but that females shall inherit equally.

All these rules have been modified or changed by the statute laws of the several states in this country. The second and third, particularly, have been entirely abrogated. Generally, all the issue of a deceased person inherit equally, without regard to sex or age.

The fourth rule or canon of descents is, that the lineal descendants, however remote, of any person deceased, shall represent their ancestor ; that is, shall stand in the same place and have the same right to an inheritance that their ancestor himself would have had, had he been living when the person last having the ownership died. This

How is the descent of property regulated by the common law ? What is the first canon ? The second ? The third ? How have these canons been changed in this country ? What is the fourth canon ?

taking by representation is called succession *in stirpes*, or according to the *roots*; as all the branches inherit the same share that their root whom they represent would have done.

This rule, modified by the changes made in the preceding rules, is generally followed in this country. Thus, if John Doe, the owner of the estate, have several sons, one of whom dies during the lifetime of his father, but leaves children or grandchildren, such children or grandchildren will succeed to the share their father or grandfather would have been entitled to, had he been living at the time of the death of John Doe. By the same rule, if the son of John Doe have left both children and grandchildren, the grandchildren will be entitled altogether to the same share, neither more nor less, that their immediate father would have been entitled to as one of the children of the deceased son of John Doe.

To exemplify this rule more fully; if, at the time of the death of John Doe, there were living three sons, and issue of a fourth son or daughter who had died previously, the estate of John Doe would be divided by the law into four equal parts, of which one part would go to each of the three sons, and the fourth part to the issue of their deceased brother or sister. If such issue of the deceased brother or sister consisted of four children, then said fourth part of John Doe's estate would be again subdivided into four other parts, one of which would go to each of said children. But if such issue consisted of four children who were living, and four grandchildren, the

What is this mode of succession called? Give an example of it. If John Doe died leaving three sons living and issue of a fourth son who was dead, how would his estate be divided? If such issue of the deceased son consisted of four children? If such issue consisted of four children who were living, and four grandchildren the issue of a deceased child?

issue of a deceased child, then said fourth part of John Doe's estate would be subdivided into five parts; one for each of the children, and one to be again cut up into four parts for the four grandchildren.

When there are no lineal descendants, the collateral kindred take the estate according to this mode of representation in all cases by the common law; but here the statutes of several of the states follow a rule of the civil law which is in some respects different. If any person of equal degree with the person represented still subsists, as if the deceased left one brother and several children of another brother, the succession is still guided by the roots, as at the common law; but if both the brothers were dead leaving issue, then all such issue share alike, they being themselves now next in degree to their ancestor in their own right and not by the right of representation.

The difference would be this: that if the only heirs of John Doe were six nephews—three by one ~~son~~, two by another, and one by a third—the common law would divide the estate into three parts, and distribute it thus: one third part to the three children who represent one brother, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of his father; but the civil law would divide the estate of John Doe into six equal parts, and give one to each of the six nephews, without regard to the roots from which they sprang.

The fifth canon of descent is, that on failure of lineal descendants or their issue of the last owner, the inheritance shall descend to his collateral relations, *being of the blood of the first purchaser*, or person who first acquired the estate by purchase, subject to the three preceding rules.

How is this rule of taking by *stirpes* applied in the case of collateral kindred, by the common law? How by our statute law? Give an example showing the difference. What is the fifth canon?

This rule is founded on the distinction formerly noticed between the acquisition of property by descent and by purchase. The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by will, sale, gift, or by any other method, except only that of descent.

By this rule, if lands came to John Doe by descent from his father, none of the brothers or sisters of his mother could inherit them on failure of lineal descendants from him, for such relations have none of his father's blood; and, on the other hand, if they descended to John Doe from his mother, his father's kindred could not inherit, for the same reason.

The sixth canon is, that the collateral heir must be the next collateral kinsman of the last owner, of the *whole blood*. A kinsman of the whole blood is he that is derived not only from the same ancestor but from the same couple of ancestors. If John Doe has a brother derived from the same father with himself, but not from the same mother, the brother will be only his brother of the *half blood*, and for that reason can never inherit his estate.

The seventh and last canon is, that in collateral inheritances the male stock shall be preferred to the female, unless the lands shall have, in fact, descended from a female.

The last rule has been abolished in this country. In fact, all these canons of descent, except the fourth, have been so modified and altered by our statute laws that but little of them remains; but still, as what does remain

What distinction is this rule founded on? Who is a first purchaser? How does this rule affect the kindred of the mother or father of a deceased person leaving lands which descended to him from such mother or father? What is the sixth canon? What is a kinsman of the whole blood? Give an example of one not of the whole blood. What is the seventh canon? Is it in force in this country?

forms the basis upon which those alterations have been engrafted, the actual state of our own laws on this subject cannot be clearly understood without a knowledge of them.

CHAPTER XXIV.

OF THE ACQUISITION OF PROPERTY BY DEVISE.

FORMERLY, in England, the right of transferring property by will was circumscribed with many restrictions; but almost all these have been removed, at least in this country. By the laws here in force, every person of sound mind and of sufficient age to possess discretion, may *devise*, or transfer by will, any or all his property, both real and personal.

A *will* is defined to be the legal declaration of a man's intentions, which he wills to be performed after his death. In all the states there are statutes regulating wills, and prescribing the mode in which they must be executed and authenticated.

The person who makes a will is called the *testator*. The will is usually required to be in writing, and signed by the testator in the presence of one or more subscribing witnesses.

The same strictness in the use of words having a technical legal signification, is not necessary in a will as in a

Why is it necessary that these canons should be understood?

Who may make a will? What kinds of property can be disposed of by will? Give the definition of a will. By what laws are the modes of execution and authentication regulated? What is the maker of a will called? How is a will usually required to be made?

deed; for, as it is to be supposed that wills are often, from the necessity or urgency of the case, made by persons who are not familiar with legal forms, and without the means of obtaining competent advice in such matters, a greater latitude is allowed in placing the proper construction upon the words used. In the case of a deed, for instance, as will hereafter be seen, the word *heirs* is necessary to convey an estate in fee simple; but in a will, any words that clearly express the intention of the testator to give such an estate will be sufficient.

In giving a construction to a will, the leading rule is that the *intention* of the testator shall govern. But that intention must be gathered from the will itself, and not from any verbal declarations or extrinsic circumstances existing at the time it was made. If there is any ambiguity in the words used, so that without such extrinsic circumstances no sensible meaning can be given to them, then such circumstances may be proved to explain their meaning; but such proof is never admitted to contradict or alter the meaning of the words, or to supply any deficiency that might be supposed to exist in the dispositions of the testator.

If, for instance, there should be in the description of the person to whom a bequest or devise was made, any ambiguity in consequence of which the description would apply to more than one person or class of persons,—as if the devise was to Richard Roe and there should be two persons of that name,—evidence may be given to show which of such persons was really meant. But if one

What difference is there in the rules relative to the use of words having a technical legal signification in wills and in deeds? Give the reason for this difference. What is the leading rule in giving a construction to a will? From what must the intention of the testator be gathered? What kind of ambiguity can be explained by verbal testimony? Give an example of an ambiguity that can be thus explained.

should will property to his nephew Richard Roe, and there should be two nephews, one named Richard and the other John, evidence could not be given to show that the testator had made a mistake in inserting the name, and had, in fact, intended to give the property to John, because that would be to contradict the words used, and not to explain them.

But though a testator need not make use of terms or phrases having a technical legal signification, if he does use them that signification will be given to them, and evidence will not be admitted to prove that he was ignorant of the legal effect of the language used by him, and intended to express a different meaning. Thus, if he should devise to one an estate in fee simple, proof could not be introduced to show that he intended to give only an estate for life; nor if an estate for life was given, could it be shown that he meant to give any other kind of estate.

This strictness in adhering to the meaning of the words used by a testator is observed because it is reasonable to suppose that what a man reduces to writing in a solemn manner is the best evidence of his real intentions; and if they were suffered to be contradicted after his death by verbal testimony, there would be very little security that any man's will would be carried into effect. The law cannot weigh with precision the particular judgment or ability of each individual, or restrict the making of wills to those persons who are free from ignorance; but if testimony was admitted to show that a testator was ignorant of the meaning of the words used by him and intended them to have some other meaning, it would, in effect, be an attempt to do so; since the intentions of persons supposed to be

Give an example of one that cannot be. If a testator uses technical terms, what effect is given to them? Can verbal proof be adduced to show that his meaning was different? What are the reasons for adhering strictly to these rules?

thus ignorant, though deliberately and solemnly expressed in writing, might be set aside and entirely frustrated. Proof of the loose and casual conversations of the testator, at times when he could have had no expectation that what he may have said would be used for such a purpose, would afford but very unreliable evidence of his real intentions.

In the use of the words *will* and *testament*, the former is understood in strictness as applicable to a devise of lands, and the latter to a devise of personal chattels. There was this difference at the common law,—that while the latter operated on all the personal property the testator died possessed of, the former would only pass such real estate as he had at the time of making and publishing his will. But this distinction is abolished, at least in many of the states, by statute; and when the words of a will import that all the property of a testator is disposed of, they will be construed to mean all his property, either real or personal, which he had at the time of his death.

A testator may dispose of all or of any part of his property; but such as he does not dispose of descends to his heirs in the same manner as if no will had been made. The mere declaration of his intentions, however strongly or clearly they may be expressed, that certain persons shall not have any of his property, will not prevent its descending to them if they are his heirs at law, unless it is otherwise disposed of, or given to some other persons, by the will.

No will is of any effect until after the death of the testator; and hence the testator may, during his lifetime,

To what are the words *will* and *testament* understood to apply? What difference was there formerly between the effects of a will and a testament? Is that difference still preserved? How may a testator dispose of different portions of his property? What is the effect of the declaration of his intentions as to any property not actually disposed of? When does a will take effect?

revoke or annul any will made by him; and if he makes several, the last only will be effectual.

As we have seen, wills are usually required to be in writing; but there are some cases in which sickness and death comes suddenly upon persons in situations where, from the want of writing materials, or some other unavoidable cause, a written will cannot be made. In such cases, one may make a verbal or *nuncupative* will; but such wills, from the liability there would be to impositions and frauds if permitted without restraint, are subject to several restrictions, and are usually regulated by the statutes of the several states.

They are always required to be made in the last sickness of the deceased, in the presence of two or more witnesses expressly called upon to take notice or bear testimony to the bequests made. Such wills are never regarded with favour, except where the testator is surprised by sudden and violent sickness; or, as in the case of soldiers and seamen, exposed to unusual and imminent dangers, in situations where the making of a will with the ordinary formalities would be difficult or impossible.

CHAPTER XXV.

OF EXECUTORS AND ADMINISTRATORS.

As stated in the preceding chapter, either real or personal property may be transferred by the owner to whom he pleases, by will or testament; but if he makes no disposition of it, all that he possessed at the time of his death

What is a *nuncupative* will? When and how may such a will be made?

descends to his heirs. But in either case, it is necessary for the settlement of his estate, the payment of his debts, and an equitable distribution of the remaining effects, either as directed by the will or as the law provides in case there be no will, that some one or more persons should be appointed to execute these purposes.

Such persons may be and are sometimes appointed by the testator in his will, in which case they are called *executors*. But if there be no executors named in the will, or if there be no will, such persons are appointed by a court or officer, according to the statutory laws of the particular state, and they are then called *administrators*.

If there is no will, the person appointed is called simply an administrator. If there be a will, but no person appointed by it, or if those appointed refuse to serve, the person who does serve is called an administrator *with the will annexed*.

Sometimes an administrator dies, resigns, or is removed before his duties have been fully performed, in which case a successor is appointed, who is called an administrator *de bonis non*, or an administrator of the *goods not administered* by his predecessor.

The mode of appointing administrators, or granting letters of administration as it is sometimes called, is prescribed by the statute laws in each state; and as these laws are sometimes different, they should be carefully examined by those having occasion to demand such an appointment.

The testator may appoint such persons as he pleases his executors; and he may give them specific directions and

Why are executors and administrators appointed? What is an executor? What is an administrator? What is an administrator with the will annexed? When an administrator dies or is removed, what is the person appointed to succeed him called? Where is the mode of appointing administrators prescribed?

powers as to the disposition of his estate. He may authorize them to sell or otherwise dispose of either or both his personal and real estate; but if an executor is simply empowered to sell land and distribute the proceeds, he is not thereby authorized to take immediate possession of it. It descends to the heir at law, who is entitled to enjoy the proceeds until the power to sell is executed by the executor, when the title of the heir becomes divested.

If the testator intends that the executor should take possession of the land, he should devise or bequeath it to him for the purposes designed; and though there be no such express devise, if the will imposes upon the executor duties of such a nature that they cannot be properly executed without having the possession, such a devise will be *implied* by the law, because the testator must be presumed to have intended that which was necessary for carrying his purposes into effect.

If there be no will, an administrator is appointed for the personal property only; and, generally, the power of appointment is restricted in the first instance to certain persons. Thus, by the English statutes—and they have been generally followed in this country without much variation in that respect—administration of the goods of the wife must be granted to the husband; of the husband's effects, to the widow or next of kin, or to both. Among kindred, those are to be preferred that are nearest in degree to the *intestate*—as the person dying without a will is usually called. When there are several of equal

Who may a testator appoint as his executors? What authority may he give them? If he gives them authority to sell real estate, does that empower them to take immediate possession of it? If the testator intends to give his executors immediate possession of real estate, how must he do it? When will a devise to them be implied? For what kind of property is an administrator appointed? Who are to be preferred in the appointment of administrators?

degree, any of them may be selected. If none of the kindred apply for letters of administration, a creditor may; and on failure by all these to make application, letters may be granted to any discreet person.

An executor or administrator is usually required to give a bond, with security, to an amount greater than the value of the property likely to come into his hands, conditioned that he will faithfully execute the duties and trusts committed to him. He is also required to take an oath to the same effect. He then receives a certificate under the seal of the court by whose authority he is appointed, that he has been duly appointed, given the necessary bond, and taken the oath required; which certificate constitutes what is called his letters of administration.

As has been already observed, the principal object of the appointment of an administrator is the speedy settlement of the debts and the distribution of the effects of the deceased to those entitled to receive them, by some competent person. Hence, he has certain duties to perform, and the law invests him with the powers necessary for the performance of those duties.

His first duty is to ascertain and make out a statement of the goods and money belonging to the estate, and of the debts which the estate owes. He is usually required to file such a statement or inventory in the proper court or office within a certain time. He is then to sell such goods, which are called *assets*, or so much thereof as may be necessary to pay the debts, in the manner prescribed by the statutes of the state in which he may be acting.

Having thus collected money, he is to pay the debts and distribute the remaining money or effects among those to whom they have been bequeathed by will, or to the

What security are administrators required to give? What are letters of administration? What are the first duties of an administrator? What are assets? What is he to do with them?

heirs of the deceased person. If there is not sufficient property to pay all the debts, he is to pay them in the order in which they are entitled to preference, if there be any to which the law gives a preference; or, if they are all of equal dignity, to divide the assets among them in proportion to their respective amounts. When there is not sufficient personal property to pay the debts, he must proceed in the mode pointed out by the statutes to make the real estate assets; and if the real and personal estate are, both together, insufficient, the estate is settled as insolvent.

In all the steps to be taken for these purposes, the administrator must be guided by the statute laws of the state where the administration is granted, which usually contain minute directions on the subject, but which vary somewhat in the different states, and are frequently altered by the state legislatures.

Letters of administration may be granted in the state where the intestate resided at the time of his death, or in any state where he had personal property. The powers of an administrator do not extend beyond the limits of the state wherein he is appointed, but by the laws of many of the states, an administrator appointed in another state may administer on property, after filing a copy of his certificate or letters in the proper court of the state wherein such property is found, and having the same approved or confirmed. Or, if the intestate have property in several states, an administrator may be appointed in each, and

If they are insufficient to pay all the debts, how is he to distribute them? When the personal property is insufficient to pay the debts, what must he do? If all the property is insufficient, how is the estate settled? In taking steps for such purposes, how is the administrator to be guided? In what states may letters of administration be granted? How must an administrator appointed in another state proceed to obtain property of the intestate?

each administrator will be bound to administer on the property in his proper state.

There are some rules of law common to all executors and administrators, which it may be useful to notice.

If a stranger or person without any authority takes it upon himself to act as administrator, by taking possession of or intermeddling with the goods of the estate, the heirs or creditors may, if they choose, treat him as an administrator, by requiring him to account as such for all the goods in his hands; and he will be subject to all the liabilities of an administrator to the extent of the assets received by him, without any of the profits or advantages an administrator properly appointed would be entitled to. Such a person is called an administrator *de son tort*, or of *his own wrong*. He cannot bring an action himself in right of the intestate, but he may be sued. As against creditors, he will be allowed all payments made by him to any other creditor of the same or a superior degree, except payments to himself.

One of the first duties of the executor or administrator is to defray the funeral expenses of the deceased, which are to be paid before all other debts or charges; and these expenses may be proportionable to the circumstances of the deceased and the estate left by him. In the payment of other debts the rules of priority must be observed; for if the executor or administrator pay those of a lower degree first, he will be liable to make up any deficiency thus occasioned out of his own property. To ascertain the relative degree of the debts, or the order in which they are to be paid, the statutes of the particular states must be consulted.

If a stranger meddles with the goods of an intestate, what will be the effect? What is a person so meddling called? What are his liabilities? What debts must an administrator first pay? What next? How is he to ascertain the relative degrees of the debts? What is the consequence of his first paying debts of an inferior degree?

The personal property possessed by the deceased at the time of his death becomes absolutely vested in the executor or administrator. He may, therefore, take immediate possession, and upon the sale of it, the money due therefor becomes his in his own right, and he may sue for it without styling himself administrator. But for debts or claims due the deceased in his lifetime and remaining uncollected, the administrator must sue as such administrator, though when they are collected they become his. This rule, that such property shall be regarded as his own, is adopted because he is personally accountable for the due application of it, and it is therefore deemed reasonable that he should have the entire control of it.

Any misapplication of the assets of the deceased by the executor or administrator, as the sale of property in an unauthorized manner, or the application of money to pay debts not due or not entitled to payment until after other debts are paid, or any negligence whereby such assets become lost, as the failure to take proper care of the goods, or the neglect to sue for and prosecute diligently claims due the estate, is denominated *waste* of the assets; and the administrator and his securities are liable to make up to the persons interested all sums so lost.

Any *malfeasance*, or misuse of his power as administrator, as the taking possession of the goods without making and filing a proper inventory, or without taking in due time the requisite steps for the settlement of the estate, as required of him by the statute laws, may also render him and his securities liable for the value of the property which came to his hands, in an action for waste.

What right has an administrator to the personal property of the intestate? How may he sue for it? How must he sue for claims due the intestate in his lifetime? What is the reason for regarding the property as belonging to the administrator? What is waste? What are the consequences of negligence or malfeasance?

There is this difference between an executor and an administrator, by the English law, and it is the same in this country unless where the statutes of the states have altered it, that the executor of an executor takes the place of his testator ; but it is not so with the administrator of an administrator, or the administrator of an executor. Thus if B is A's executor and dies, himself leaving an executor, the executor of B becomes A's executor likewise ; but if B leaves no executor, his administrator will not be entitled to administer on any part of A's estate. The reason for this distinction is said to be founded on the special confidence and trust reposed in an executor by the testator, wherefore such executor is allowed to transmit that trust to another in whom he has confidence ; but as an administrator is merely an officer appointed under the law, in whom the deceased has reposed no trust, on his death it results back to the law to appoint another.

CHAPTER XXVI.

OF CONTRACTS IN GENERAL.

A *contract* is defined to be an agreement, upon sufficient consideration, to do or not to do a particular thing.

By an *agreement* is to be understood a mutual bargain or consent to do or not to do the thing to be done or left

What difference is there by the English law between an executor and an administrator ? What is the reason given for this distinction ?

Give the definition of a contract. What is to be understood by an agreement ?

undone. There must, therefore, be at least two contracting parties of sufficient ability to contract. That is, they must both be persons whom the law considers of sufficient age and discretion to make a contract, and neither of them under duress or other legal impediment which would deprive them of the power to do so.

The agreement to some or all of the stipulations may be either *express* or *implied*. When all the terms of the agreement, or the things to be done by both parties are declared at the time of making it, as if I agree with a carpenter that I will pay him five hundred dollars for a house of certain dimensions, which he agrees to build within a certain time, with suitable materials, and in a workmanlike manner, these stipulations would be expressed, or expressly agreed upon. But if I employ a carpenter to build me a house, and nothing is said or agreed upon as to the price I shall pay him, or as to the kind of workmanship, the law gives him a right to demand of me such compensation as his labour is reasonably worth, and hence there is an implied contract or agreement on my part to give him that much; and there will be also an implied contract on his part to do the work in a suitable manner.

There is an implied agreement, indeed, in every contract, that the parties will severally perform whatever the laws require of them in fulfilment of or as a consequence of the stipulations actually expressed. Thus, if one of the contracting parties fails or refuses to perform his part of the agreement, he will be liable by the law to pay the other such damages as he has sustained by such neglect or refusal, and an agreement to do so will be implied.

As all contracts consist of mutual stipulations, by which

What kind of parties and what number are requisite to make a contract? What is an express agreement? When is an agreement implied, and how? Give an example of an implied agreement.

something is agreed to be done or performed by both parties, one cannot call upon the other to perform a part of the agreement, unless he has performed or has at least offered to perform his own part. Thus, if I agree to give one hundred dollars for a horse upon his being delivered to me at a certain time and place, unless the seller delivers or offers to deliver the horse at the time and place specified, he cannot compel me to pay the money; and unless, upon the offer to deliver me the horse at such time and place, I pay or offer to pay the proper sum of money, I cannot require him to give me possession of the animal.

Whenever one of the parties has performed or has, in good faith, offered to perform all that he agreed to do, and the other has failed or refused to perform any material part of his agreement, the party who is not in fault may, at his choice, either proceed to compel the other party to fulfil the contract, or he may rescind it and treat it as having been abandoned.

But when one party makes use of his privilege to rescind a contract because the other has not performed his part within the time or in the manner agreed upon, he must rescind the whole contract from the beginning, and place the other party in the situation in which he stood before the contract was made. If he will not or cannot do this, the party in default may require compensation for the benefit the other has actually received by a part performance, deducting such damages as he may have sustained by the non-performance of the whole contract.

Thus, if I have paid the seller of the horse a part of

What must either party do before he can call upon the other to fulfil a contract? Give an example. When one of the parties has performed his part and the other has not, what may the former do? If he rescinds the contract, what must he do? Give some examples. If there has been a part performance, and the party in fault cannot be restored to his original situation, what is the latter entitled to?

the price, and he chooses to rescind the bargain because of my failure to pay the balance upon his offer to deliver the animal, he must pay back to me the money I had previously paid him on that account. So, if the carpenter failed to complete my house according to his agreement, and I, nevertheless, took possession of the unfinished building, inasmuch as I derive some benefit from it, and cannot give him back his labour and materials, I must pay him what such labour and materials are really worth to me under the circumstances; but I may deduct from such payment all the damages I may have sustained in consequence of the contract not having been completed according to the agreement.

When two or more persons agree to perform mutual acts, as one to sell certain goods to the other, and that other to pay the seller a stipulated price for them, and the goods are sold and delivered and the money paid, the contract is said to be *executed*; there remains nothing more to be done. In such cases of executed contracts, if the transaction be fair and not detrimental to the rights of other persons, the *consideration* is of little consequence, as one may give away his goods if he chooses; and if he puts them in the possession of the person to whom they are given, he cannot afterward retract his gift, though it may have been made without any consideration or recompense whatever.

But if there is a mere agreement to sell upon the one hand and to pay upon the other, or there remains any thing to be done in the future by either party, the contract is said to be *executory*; and in this case the consideration becomes a matter of very great importance, for unless there be a sufficient consideration for an agreement no one can be compelled by law to perform it.

Give an example. What is an executed contract? What is an executory contract? What is the difference as to the consideration?

There are two kinds of considerations which may be sufficient under different circumstances. A *valuable* consideration is one arising from the payment of money, an exchange of other valuable property, the performance of labour or other services, marriage, or such other benefits as the law esteems a fair equivalent or exchange of value for the thing to be done or performed by the other party.

It is not necessary that such other party should actually receive and enjoy the equivalent thus transferred by the party with whom he contracts. It is sufficient if the latter parts with it and loses the benefit of it in consequence of his agreement. Thus, if I agree with another, for a certain sum of money, to forbear to do a certain act or acts whereby I might have made a profit, as to practise a trade or profession in a particular place, the loss of such profits is a valuable consideration, and will enable me to enforce payment of the sum agreed upon, although my forbearance may have been of no actual service to the other party.

A *good* consideration is one founded on motives of generosity, benevolence, or natural affection, as where a man grants an estate to a son or other relation.

The material difference in the effect of these two kinds of consideration is, that a contract founded on a good consideration only, though binding as between the parties to it, may be set aside and deemed fraudulent on the application of a creditor or subsequent purchaser. The law considers that it is inconsistent with social obligations to permit a man to give away his property, or transfer it to

What different kinds of consideration are there? What is a valuable consideration? Is it necessary that the other party should actually enjoy the thing given in consideration? Give an example where he does not. What is a good consideration? What material difference is there in the effect of these kinds of consideration? What are the reasons for this difference?

his relatives without receiving actual value in return, when he is at the same time indebted to others who may have given him credit because they saw him in possession of such property, and who may look to it as their security for payment. Such a transfer is deemed fraudulent as regards the creditors. But a man, even in embarrassed circumstances, may transfer property for a valuable consideration without injury to his creditors, because he receives something by means of which he may be equally and perhaps better able to pay his just debts. A valuable consideration may, under such circumstances, be sufficient when a merely good one would not be.

The thing to be done or performed by virtue of a contract must be lawful; that is, it must be something which the law does not prohibit. Otherwise, the agreement will be entirely void. Thus, if one should agree with another, for a stipulated sum, to commit some crime, such as murder or robbery, the contract could not be enforced. Upon this principle it is that debts incurred by gambling cannot be recovered, where gaming is prohibited by law.

In general, contracts may be entered into either by the verbal agreements of the parties, or such agreements may be reduced to writing. The latter mode is always the safest and best, as the exact stipulations of the parties can then be readily produced in case of a dispute. There are some kinds of contracts, indeed, which *must* be in writing, or they will be void and of no effect.

In England, in the time of Charles II., a statute law was enacted which is commonly called *the statute of frauds*, from its having been passed to prevent frauds and perjuries in upholding fictitious or misrepresented contracts. It required that certain kinds of agreements—some of which

What is the effect of a contract to do a thing which is unlawful? How may contracts be entered into? What is the statute of frauds? When was it enacted? What does it require? What is the object of it?

will be alluded to hereafter—to be valid, should be reduced to writing, and signed by the party to be charged therewith or by his agent. A similar law will be found among the statutes of all or almost all the states. It may vary in some particulars in each state, but the general features are the same; and it is important to bear in mind that in all the cases embraced in the statute of frauds of the state wherein a contract may be made, such contract must be in writing, or it will be of no validity.

This statute does not, however, in any respect alter the nature or effect of a contract. It requires the ceremony of reducing the engagements of the parties to writing, and that the signature of the party to be charged with the performance of any future act shall be attached thereto, merely for the purpose of affording more certain and reliable evidence of the actual agreements entered into.

CHAPTER XXVII.

OF CONTRACTS FOR THE SALE OR EXCHANGE OF PERSONAL PROPERTY.

SALE or exchange is a transmutation of property from one person to another. If it be a transfer of one article or species of goods for another it is usually called an *exchange*, but if it be a transfer of goods for money it is commonly called a *sale*. As there is no difference in the

How does the statute of frauds alter the nature of a contract?
What is a sale? How does it differ from an exchange?

law relative to sales or exchanges, what is to be said under this head will be equally applicable to both.

When one man sells his goods to another, the former is called the *vendor*, and the latter the *vendee*. Every person who is the rightful owner of goods may vend or sell them to whom he pleases, at any time or in any manner, under the restrictions already mentioned; and unless there be a judgment against him for some debt or damages and the writ of execution be delivered to the sheriff or other proper officer. In the latter case, a sale will be considered fraudulent, and the goods will be liable to be taken wherever they may be found, to satisfy the execution.

Upon the principles already noticed in the preceding chapter, if one man agrees with another for goods at a stipulated price, he has no right to carry them away until the price be paid, unless it is expressly agreed that he may do so. But if a merchant offers a piece of goods for sale at a certain price, and a customer or other person to whom the offer is made, at the same time tells him he will give such price, the contract is made so far that neither of them ought to refuse to do what he has agreed, if the other immediately offers to perform his part. Thus, if the merchant immediately offers to deliver the goods, the other must make payment; and if the customer offers to pay the money, the merchant must deliver the goods; and if either refuses so to do, the other will be entitled to damages.

As soon as such a contract is made, the right of property in the goods is transferred to the vendee; and if they should be lost or destroyed by accident, as by fire or shipwreck, he would have to bear the loss, though he may

What are the parties to a sale called? Under what circumstances may goods be sold? What acts are necessary to constitute a sale? What right is there transferred to the vendee on the conclusion of the contract? Who is then the loser if the goods be accidentally destroyed?

not have had them actually in his possession. They would also be liable to be taken on execution for the payment of his debts, unless, by the terms of the agreement, the vendor was permitted to retain them as a security for the performance of some future act to be done by the vendee.

At the same time that the right to have the goods is transferred to the vendee, the vendor acquires the right to have the price agreed to be paid; and if it is refused, he may rescind the contract, in which case no right of property would pass to the vendee; or, he may waive his right to rescind, and rely upon his right to enforce payment by law.

But it is a very common thing for contracts to be entered into for the sale of goods upon a credit, or for a price to be paid at some future time; and in that case the right of property passes to the vendee as soon as he has done what he agreed to do at the time of the sale. If, for instance, the agreement is that the price shall be paid at the end of three months, the vendor has no right to demand it until the expiration of such period of time, nor any right to retain the goods until the payment is made, unless it is expressly stipulated that he may do so.

But here the statute of frauds interposes some checks upon hasty and loose agreements for the sale of goods upon credit. That statute provides that no contract for the sale of goods to the value of fifty dollars or more shall be valid, unless the buyer actually receives part of the goods by way of earnest, or gives part of the price to the vendor to bind the bargain, or some memorandum in writing be made and signed by the party who is to be bound by the contract. Whenever, therefore, any parties desire

What rights has the vendor? What may he do if payment is refused? What are the rights of the parties when the sale is upon a credit? How does the statute of frauds affect sales upon credit? What must be done to make a sale binding when that statute operates?

to contract for the buying or selling of goods, to a larger amount than that specified in the statute of frauds of the state in which they may be, upon a credit, one of these three things must be done, or the agreement cannot be enforced for any purpose.

If a man sells goods as his own, there is a warranty implied by the common law that his right or title to them was good; so that if it afterward turns out that he had no right to them, and the purchaser, consequently, acquires no title, the latter may demand compensation of the former for the loss incurred in their purchase. But the vendor is not responsible for the quality or soundness of the goods sold by him, unless he expressly warrants them to be sound or good, or unless he knew the facts to be otherwise, and made some false representations by which the purchaser was deceived.

Where a manufacturer or other person contracts to furnish goods for a particular purpose at a future time, as in the case of the carpenter who contracts to build a house, mentioned in the preceding chapter, there is an implied agreement, on his part, that the article shall be of such materials and workmanship as will render it suitable for the purpose for which it was designed; and if it should not be suitable for such purpose when furnished, the person who contracted to receive and pay for it would not be bound to do so. So, if I should contract with a tailor for a coat, to be made out of certain materials, for my own wear, an engagement would be implied on his part that the coat when furnished should fit; for otherwise, as he knew the purpose for which it was designed, and undertook to furnish it for that purpose, it would be unreasonable to re-

What warranty is there implied when a man sells goods as his own? What is the general rule as to the responsibility of the vendor for the quality of the goods? What will render him so responsible, when goods are furnished for a particular purpose?

quire me to accept and pay for an article that would be useless.

When goods are sold in quantities by a small part or sample, exhibited to the buyer as a specimen of the whole, the exhibition of the sample is a representation by the seller that the remainder of the goods are equal in quality to the sample. Here, although the seller might not actually know that his representation was false, yet, as he undertakes to make such an assertion of their quality, when the goods are so situated that the buyer cannot conveniently examine them, there would be a fraud practised upon him if such a representation should prove to be deceitful.

So, when the whole of the goods are at a distance, or so situated that it is impossible for the buyer to examine the quality, as in the case of the lading of a ship at sea, or when the goods are packed in large masses, so that they cannot be examined without tearing or otherwise injuring them, or without an unreasonable amount of labour, the law will raise an implied agreement, on the part of the vendor, that they are marketable and of the quality represented. But when the goods are accessible to the examination of both parties, a representation as to their quality by the seller, unless he knows such representation to be false, is considered as the mere expression of his opinion, and the buyer must rely on his own skill and judgment to determine whether or not they are suitable for his purposes.

It is said that in the case of provisions sold for domestic use, such as fresh meat in the market, the seller warrants that they are sound and wholesome. But where such a

What will render the vendor responsible for the quality of goods when sold by sample? When they are so situated that the buyer cannot examine them? When they are equally accessible to the examination of both parties, what are representations as to quality considered?

warranty is implied, it seems rather to depend upon the manifest fraud committed by the seller ; as, if a butcher should sell tainted meat, the very fact would justify the inference that he must have known it, and that he could not have sold it with any other purpose than to deceive and defraud his customers.

CHAPTER XXVIII.

OF CONTRACTS FOR THE SALE OF RIGHTS TO REAL PROPERTY.

ALL persons in possession of real property are capable of selling or transferring it to others, unless the law has placed them under some particular restrictions or disabilities. They will be considered to be in possession, whether they are actually holding the property themselves, or it is in the possession of persons holding it by their permission, or under some temporary right acquired from them.

But one who has only a right in law to have the possession, another having the possession and holding it adversely to, or by a claim hostile to his, cannot transfer to a third person his mere right. This the law prohibits, with a view to prevent the encouragement of litigation.

With this exception, contracts may be made for the sale or transfer of any rights or estates in real property, and such contracts are governed by the same general rules to

What warranty is there implied by the sale of provisions for domestic use? What is the reason for this implication?

Who may sell real property? When are persons considered to be in possession? How does the possession affect the right to sell?

which other contracts are subject. But in order to render such rights secure to their possessors, and to prevent disputes, the law prescribes that such transfers must be evidenced by better proof than could be obtained from verbal testimony.

It is provided, therefore, by the statute of frauds, that all estates or interests whatever in real property, conveyed or attempted to be conveyed by parol, and not put in writing and signed by the parties conveying or contracting to convey the same, except leases for a term not exceeding three years, shall be deemed to be leases or estates at will only. It is also provided by other statute laws that all transfers of such estates or interests as are thus required to be conveyed in writing must be made by deeds properly executed.

A *deed* is defined to be a writing sealed and delivered by the parties. It was formerly the custom to make as many copies of the deed as there were parties to it, and these copies were cut or indented on the top or sides in acute angles like the teeth of a saw, so as to match or correspond each with the other, as a greater security against false copies or forgeries; and hence, the deed so made was called an *indenture*. When a deed was made by one party only, it was not indented, but polled or shaved even, and it was called a *deed-poll*, or single deed. At present, for the simple transfer of property from one person to another, one deed executed by the person who transfers it is usually deemed sufficient; but though no copies are made it is still frequently called an indenture.

As in the case of the sale of personal property, the seller is called the vendor, and the buyer the vendee, but in speaking of the parties named in a deed, the person

What are the contracts relating to real estate that are required to be in writing? Why are they required to be in writing? Define a deed. Why are deeds called indentures? What is a deed-poll?

making the conveyance is usually called the *grantor*, and the person to whom it is made the *grantee*.

The requisites of a valid or good deed are as follows:—First, as in the case of any other contract, it must be made by persons able to contract and be contracted with, and it must be founded on a sufficient consideration.

Secondly, the deed must be written or printed on paper or parchment. It will not be a good deed if written on stone, board, linen, or any other substance.

Thirdly, the contents of the deed must be intelligibly expressed. That is, the names of the parties, the amount or nature of the consideration, the description of the premises conveyed, and the nature or quantity of the interest granted, as whether it be the fee simple, an estate for life, or for years, should all be written out in sufficient words to declare, clearly and legally, the grantor's meaning. If it contain all these requisites, the precise form of the instrument and the order in which they may be inserted are immaterial.

But it should be remembered that the contents of a deed are subject to more strict rules of construction than those of wills. Therefore, the intentions of the grantor should be expressed in words having the proper legal signification, for the courts will invariably presume that the grantor understood the legal effect of the words used by him. If A should, by deed, transfer a tract of land to B, to be holden by him for ever, B would have an estate for his life only, because he could not himself hold it longer. If it was intended to give him an estate in fee simple, or one that would descend to his heirs, that intention should have been manifested by a grant to him *and his heirs*.

What are the parties named in a deed called? What are the requisites of a deed as to the parties and the consideration? As to the substance on which it is written? As to the contents? What is the rule as to the construction of the contents? Give an example.

Sometimes stipulations of various kinds are inserted in a deed. The most usual of these are warranties, which may be either general or special. A *general warranty* is when the grantor binds himself and his heirs to defend the estate granted to the vendee, or to him and his heirs and assigns, against the lawful claims of all persons whomsoever. The effect of such a warranty generally is, that if the purchaser, or any one purchasing from him, should be afterward lawfully turned out by a party having a better title than that of the grantor, the latter, or his heirs or representatives, will be bound to refund the purchase-money.

A *special warranty* is when the grantor only warrants the estate against any one claiming by, through, or under him. This, in effect, amounts merely to a quitclaim, or conveyance of such interest as the grantor had.

When an estate at will, or for years only, is intended to be granted, the deed is called a *lease*, and here any form of words will be sufficient, if they signify the intention of the grantor to let or lease the premises to the grantee during the pleasure of the grantor, or for any definite number of years. It is common, however, to insert in the lease such stipulations and agreements relative to the manner in which the property shall be used, or the conditions upon which the lease shall be forfeited, or continued, or renewed, as the parties may agree upon. Leases for short periods are not required by the statutes to be in writing; and therefore they will be binding though the agreement should be merely a verbal one.

As has been already stated, if there should be attached to a deed a stipulation that upon the performance of any

What is a general warranty and its effect? What is a special warranty and its effect? When an estate for years or at will is granted, what is the deed called? What are the usual contents of a lease? What kinds of leases are there that may be made verbally?

specified act, such as the payment of a sum of money by the grantor, the deed should become void and of no effect, the instrument would be a mortgage. It is not absolutely necessary, however, to constitute a mortgage, that the condition should be inserted in the deed made by the grantor. If, at the same time that such a deed was made, the grantee should make another deed agreeing that the deed made to him shall become void, or that he will reconvey the property upon the performance of some condition by the grantor, the two instruments will be considered as but one, in effect, and the grantee will hold only a mortgage upon the property to secure the performance of the act to be done by the grantor.

Fourthly, the deed should be correctly read to any of the parties who desire it; and if this be not done, at his request, the deed will be void as to him. If he can, he should read it himself; if he cannot, another must read it to him; and if it be read falsely it will be void, at least as to that part which is misrecited.

Fifthly, the deed must be signed and sealed by the party to be bound, or by some one legally authorized by him to affix thereto his seal and signature. If the party be present and verbally authorize some other person to affix his seal or signature, or both of them, to the instrument, he thereby adopts them and makes them his own. If he be not present, he may authorize some third party to sign and seal for him by a *power of attorney*, or an instrument given under his hand and seal, empowering such person to do the acts required, in his name and stead. The person so empowered is called *the attorney in fact* of the person whose name is to be used; and in such cases the attorney

In what different ways may a deed be made a mortgage? What is there to be attended to as to the reading of a deed? Who must sign and seal the deed? How may the signing and sealing be done by the party when present? When absent?

should always execute the deed by affixing to it the signature and seal of the person he is acting for, noting that it is done by him as an attorney in fact, and not by affixing his own signature and seal as the attorney in fact of his principal.

There are some cases in which the law authorizes certain public officers to transfer and convey, by deed, the property of an individual as effectually as the individual himself could convey it. This happens when property is sold by a collector for the payment of taxes, or by a sheriff to satisfy an execution, or when a commissioner is appointed by a court to make a deed to one who has been adjudged to be legally entitled to have the property transferred to him. In these cases, the prior legal proceedings constitute the power of attorney or authority of the officer to act for the person against whom they were directed in the disposal of his property. But as this is a compulsory mode of appointing a species of agent or attorney in fact for the person whose property is to be disposed of, it is necessary for one who is about to receive a deed from such an officer to satisfy himself that all the proceedings of the officer have been lawful; for otherwise his deed will be of no effect.

Sixthly, the deed should be delivered to the party to whom the property is transferred. A deed takes effect from the time of its delivery. The delivery may, however, be made to a third person to hold until some condition be performed by the grantee. In this case, it is called an *escrow*; that is, a scrawl, or writing, which is not to be considered a deed until the condition be performed. When

How should an attorney in fact execute a deed? When may deed be made by public officers? What gives them their authority? What are the requisites of a deed as to its delivery? What is an *escrow*? When does a deed delivered as an *escrow* take effect, and from what time?

the condition is performed, it becomes a deed to all intents and purposes, and takes effect from the time of its delivery as an escrow.

The last requisite of a deed is said to be its *attestation*, or the execution of it in the presence of witnesses. This, however, is not necessary to make the deed valid. It is only practised to preserve evidence of its execution.

Under the statutes of most of the states, a deed should be acknowledged and recorded in the proper recorder's office. Not that such acknowledgment or recording is necessary to the validity of the deed as between the parties, but because the law has deemed it politic to require that some kind of public notice should be given of all conveyances of real estate, in order that the persons making them shall not have an opportunity to commit frauds, by conveying the same property to different persons. It is, therefore, declared by these statutes, that if a person purchasing lands does not have his deed recorded within a certain time, and the grantor sells again to a person who has no information or notice of the first deed, the last purchaser, if he complies with all the conditions of the law, shall have the preference.

Sometimes contracts are made for the transfer or conveyance of real property at some future time, or upon the performance of some condition by the party to whom it is to be conveyed. It is not uncommon for one to negotiate for the purchase of land on the condition that he is to receive a deed on the payment of the whole or of a portion of the purchase-money.

By such a contract as this, he would acquire no right to have possession of the premises until the condition was performed, unless it was expressly stipulated that he should

What is the attestation of a deed? Its use? What is the reason for requiring deeds to be acknowledged and recorded? What is the consequence of their not being recorded?

have such possession. Upon the performance by him of all the conditions specified, at the time and in the manner agreed upon, if the other party should fail or refuse to make the deed to him, he would, upon the principles already stated, have the right to rescind the contract and require the other party to pay back to him the money he had advanced ; or, at his choice, to proceed by law to compel the opposite party to perform the contract as he had agreed. In the latter case, the courts, upon proper proceedings, will render a judgment or decree that the party in fault shall make a deed within a certain time ; and if he fails to do so, a commissioner will be appointed to act in his stead, and to make a conveyance, to have the same effect as if he had made it himself.

All such contracts are within the statute of frauds, and must be in writing to be valid. But if such a contract be made verbally only, and the purchaser has been put in possession of the property, and has likewise paid or offered to pay the purchase-money, the principles of equity will intervene to compel the vendor to make a deed ; because, in that case, the contract will be considered as executed, and as the deed is merely the necessary evidence of the execution of the contract, the purchaser, in equity and good conscience would be entitled to have one.

What rights does a person who contracts for the purchase of property to be conveyed at a future time acquire ? When may he require a deed to be made ? What choice has he if a deed is refused ? Under what circumstances can he require a deed to be made to him, if the contract was merely a verbal one ?

CHAPTER XXIX.

OF CONTRACTS FOR THE PAYMENT OF MONEY.

ONE of the most common of all contracts is that for the payment of money. Indeed, there is scarcely any contract, except in cases where one article or piece of property is bartered or exchanged for another, which are comparatively rare, where one party or the other does not contract for the payment of money—that being the legal standard whereby the value of all other articles is estimated.

By the term *money* is to be understood those substances to which the laws of the country affix certain denominations of value, and require all persons to receive, at such estimated denominations of value, in payment of any debts that may be due them.

In this country, the dollar, which is a coin composed of one ounce of silver of a certain degree of purity, is the primary denomination of money. There are other silver and copper coins, called fractional parts of a dollar, and gold coins of the value of one dollar and upward. There is nothing else that is, strictly speaking, money; but there are numerous banks, which are authorized by their charters to issue their notes or promises to pay certain sums of money whenever requested to do so, and these notes circulate as money, and, when received without objection, they are considered as a payment in money.

A sum of money due or to become due to any person is called a *debt*. The person who owes it is called the *debtor*,

What is to be understood by the term money? What is the primary denomination of money in this country? Of what is it composed? How do bank notes circulate as money? What is a debt?

and he who is entitled to receive it, the *creditor*. Whenever the debtor fails or refuses voluntarily to make payment of the sum due to the creditor, the latter is entitled by the law to have compulsory process to compel him to do so.

Debts are usually classed, according to the mode or form in which they are evidenced, into three classes; namely, debts of record, debts by special contract, and debts by simple contract.

A *debt of record* is one which appears to be due by some judgment or proceedings in a court of record, as when a specific sum is adjudged to be due from one party to the other, in an action or suit at law. A debt of this kind, which is very common in this country, arises when one enters into what is called a recognizance, or an acknowledgment in the presence of the court or magistrate, that a certain sum of money is due to the state or an individual, with a condition that such recognizance shall be void upon the appearance of a certain person to answer a criminal charge, or upon his keeping the peace, and the like, and such recognizance has been forfeited by the non-performance of the condition. Debts of record are considered debts of the highest nature, insomuch that, having been established by a competent court, the debtor will not be permitted afterward to contest or controvert them.

Debts by special contract are such as are evidenced by a deed or instrument *under seal*. Of this class are all bonds and other obligations sealed by the parties, and conditioned for the payment of money at a certain specified time, or upon demand, or upon the non-performance of some act which the person bound by the bond agreed to perform.

These are regarded as the next class of debts after those

How are debts classed? What is a debt of record? What is a recognizance? How do debts of record rank? What is a debt by special contract? What debts compose this class?

of record, because the act of affixing a seal to them is supposed to invest them with a greater degree of solemnity than can be given to a mere common contract without seal. Formerly, the distinction between debts of this class and those arising from simple contract was much more important than it now is. There are still some rules peculiarly applicable to them, such as that a release of the performance of the condition, or any other contract altering the liability of the person bound, except an actual payment, must also be under seal to be valid, for the reason that such subsequent contract must be of equal dignity with the former one to have any effect upon it. But in most respects there is little or no difference, in the security or in the defences which can be set up, between debts of this class and those by simple contract.

When the sum named in the bond is intended to secure the performance of some condition, as the payment of a less sum of money, or the doing of some other act which the person executing the bond agreed to do, the non-performance of the condition does not entitle the holder of it to have the whole sum intended as a security or penalty, but only such portion of it as the damages he has actually sustained by such non-performance may amount to. He cannot, however, recover any more than the sum named as a penalty, and therefore that sum should always be large enough to cover any damages that might be sustained.

The parties may, indeed, specify in the bond that the sum named as a penalty shall be the amount of damages which one party shall have upon the non-performance of any condition by the other; but even in that case, if it be stipulated that the penalty shall be forfeited upon the non-

How do debts by special contract rank? Why do they rank above debts by simple contract? What rule is there peculiarly applicable to them? When the sum named in the bond is inserted as a penalty, what sum may then be recovered on the non-performance of the condition?

performance of any one of several conditions of unequal importance, and the sum named should be greatly disproportioned to the damages actually sustained, the law will not enforce such an unreasonable agreement, and will give the party injured only such a sum as he is justly entitled to.

Debts by simple contract are those which are not evidenced by matter of record, nor writings under seal, but depend upon mere verbal or oral evidence, or upon unsealed writings. This class embraces all those arising from the almost infinite variety of contracts for money, where an obligation or promise of payment is either expressed by the parties or implied by the law. It is impossible here to notice these various contracts in detail, but they are all governed by the general rules mentioned in the chapter on contracts in general. There are, however, two species of debts which are classed among those by simple contract, that have some peculiar qualities, which will be noticed in the next chapter.

CHAPTER XXX.

OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

BILLS of exchange were originally invented by merchants, for the more convenient transfer of money from one to another, and especially for the remittance of money from one country or section of country to another. A *bill*

If it be specified in the bond that the sum named shall be the damages on the breach of a condition, what is the effect? What are debts by simple contract? What does this class embrace?

For what purpose were bills of exchange invented?

of exchange is made by drawing, in writing, a request or order by one man to another, desiring the latter to pay a sum of money therein specified to a third person, for or on account of the person by whom the bill is drawn.

The person who makes or draws a bill is called the *drawer*; the one who is requested to pay the money, the *drawee*; and the one to whom the money is payable, the *payee*. It is customary, in many instances, for the payee to present the bill to the drawee before it becomes due, in order to ascertain whether the bill is drawn by one authorized to draw, and if the drawee will bind himself to pay the money according to the order. If such is the case, the drawee signifies his engagement to do so by writing the word "accepted" on the face of the bill, and signing his name under it. After he has done this, he is usually called the *acceptor*.

These bills are called *foreign bills* when drawn in one state and directed for payment to a person in another state, or in a foreign country; and *inland bills*, when they are made payable in the same state in which they are drawn. The only difference between foreign and inland bills of exchange requiring notice is, that the damages the holder is entitled to receive, in case the bill is not paid by the drawee, is sometimes greater in the one case than in the other. The amount of such damages is regulated by the statute laws of the several states.

A promissory note is a direct engagement in writing to pay a sum of money on demand or at some fixed time, to a person therein named, or to his order, or to the bearer—which means any one who may have the note in his possession when payment is made or requested.

Both bills of exchange and promissory notes are as-

How is a bill of exchange made? What are the parties to it called? How is a bill accepted? What is a foreign bill? An inland bill? What is the difference between them? What is a promissory note?

signable by endorsement. That is, the payee may transfer all his interest in the bill or note to any other person, by writing his name on it, and such other person will then have the right to collect the money of the person who is to pay it, and, if necessary, to sue for it in his own name.

When a note or bill is thus assigned, the person assigning it is called the *assignor* or *endorser*, and the person to whom it is assigned the *assignee* or *endorsee*. If the assignment is made by the assignor simply writing his name on the back of the instrument, it is called an assignment *in blank*; and, in that case, it may be transferred from one person to another, through any number of hands, without further endorsement, as the last holder has the right to write over the assignor's name an order to pay the money to the bearer, to himself, or to any other person. But any person assigning such an instrument may, if he chooses, write over his name an order to pay the money to some particular person, or to the order of such person, and in that case such person must also endorse it if he wishes to transfer it to another person.

There is also a contract implied by the law between the assignor and the assignee. By the mere act of the endorsement, each person who assigns the note or bill becomes bound to the person to whom he makes the assignment, to pay the amount specified to such assignee, in case the party who ought to pay it does not. But the assignee also binds himself to use proper diligence to collect the money of the party who is liable in the first instance,

How may notes and bills be assigned? What right does the person to whom they are assigned obtain? What are the parties to an assignment called? What is an assignment in blank? What is the effect of such an assignment? How may the money be ordered to be paid to a particular person? How can such person then transfer the instrument to another? What is the nature of the contract implied between the assignor and assignee?

before he demands it of the assignor; and if he does not use such diligence the assignor is released.

What constitutes this proper diligence varies in different cases. In the case of such notes or bills as are *negotiable*, according to the *law merchant*—a kind of law that is founded on the usages or customs of merchants and traders—it is only necessary that a demand should be made at the time and place of payment, and, if the money be not paid, that a protest be made by a notary public, and notice thereof given to the drawer and endorsers of a bill, or the endorsers of a note, as soon as such notice can reasonably be given to them. Such drawer and endorsers become then immediately liable to pay the amount of the bill or note to the holder.

As to what kinds of notes or bills are negotiable by the law merchant, it is necessary to look to the statutes of the particular states, for they vary materially in this respect. In some states, they are such instruments only as are made payable at chartered banks; in others, all notes and bills drawn payable to order or bearer are of this character; and in others, perhaps, there are none that are governed by the law merchant.

In the case of other notes and bills, due diligence consists in resorting to all available means to collect the money of the original debtors. Therefore, before the assignee can sue the assignor, he must sue the original debtor, take out execution, and exhaust the property of the debtor subject to execution. And all this must be done as soon after the instrument is due as it can be done in due course of law. That is, there must be no unnecessary delay in commencing suit, or in any of the subse-

What constitutes due diligence in the case of negotiable notes or bills? What is the law merchant? How is it to be ascertained that notes or bills are negotiable? What constitutes due diligence in the case of other notes or bills? What must the assignee do before he can sue the assignor?

quent proceedings; for if the money might be made by the use of such diligence and it is not used, the assignor will be released.

But if the original debtor is notoriously insolvent, or the instrument is invalid, so that nothing could be gained by a suit against him, the endorser will be liable immediately. The endorser always warrants to the person who receives the instrument from him that the instrument is valid and that the person who is to pay it is solvent and able to do so. Whenever it is made clearly to appear that this warranty has failed in either of these particulars, the endorser himself is bound to pay the amount called for, and the suit against the original debtor may be omitted.

Another peculiarity in the law relative to those instruments that are negotiable by the law merchant is, that the drawer, maker, or acceptor cannot set up any payment made, as, for instance, a payment by the maker to the payee of a note, or any want or failure of consideration, as a defence to the instrument when in the hands of an endorsee who received it without notice of there being such alleged matter of defence. This rule, or rather this exception to the general rules relative to contracts, is deemed necessary because notes and bills of this character are expected to circulate or pass from hand to hand in mercantile transactions; and to prevent disputes and litigation in relation to them, it is proper that, when payments are made, the instrument should be destroyed or the payments noted upon it, for the information of strangers to whom it might be offered, and who could not be supposed to have any knowledge of the actual transactions between the original parties.

If the original debtor is insolvent or the note is invalid, when will the endorser be liable? What peculiarity is there in the law relative to the defences which can be set up against negotiable instruments? What is the reason for this peculiarity?

This exception does not prevail, however, in the case of common notes and bills, which stand, in most respects, upon the same footing with other contracts; and although the right to the debt may be transferred by endorsement, such right will be subject to all the defences the debtor would have against the original payee. In many of the states, the statutes authorize an assignee to give notice to the payor that the note or bill is assigned to him, and the debtor will not then be allowed to set up any payment or contract with the original payee, made after such notice.

In the case of notes and bills which have been passed by assignment through several hands, each endorsee, if payment is not made by the drawee of a bill or the maker of a note, may demand payment of all the previous endorsers, or of any of them, for each endorser is a warrantor of the payment of it; and if the last endorser is obliged to pay it, he may call upon the next above him, he upon the next, and so on. But when two or more persons agree to become endorsers, as joint sureties for the drawer or drawee of a bill or the maker of a note, to enable the latter to borrow money by having the instrument discounted, though each endorser is liable for the whole amount to the holder of the instrument, yet if one of them is obliged to pay it, he may demand of the others a contribution, so that the loss may be equally divided between them.

How far does this peculiarity extend to common notes or bills? When notes or bills have passed through several hands by endorsement, what are the rights of the endorsers and endorsees respectively? What are the rights of endorsers who have agreed to be joint sureties for the original parties to a note or bill?

CHAPTER XXXI.

OF CONTRACTS OF BAILMENT.

THE term *bailment* is derived from the French word *bailler*, signifying to deliver. In law it imports a delivery of goods by one man to another, on a contract, express or implied, that the person to whom they are delivered shall use them in a particular manner, or for a particular purpose, and return them to the owner when that purpose is accomplished. The person who delivers the goods is called the *bailor*, and he who receives them the *bailee*.

If cloth be delivered to a tailor to make into a coat, there is an understood or implied contract that the tailor will return it again when the coat is made. So, if goods are delivered in pawn or pledge for the repayment of money lent or advanced, the person receiving them is bound to return them when the pledgor has performed his part of the contract, by repaying the money in due time. If goods are delivered to a merchant to be sold for the owner on commission, the merchant is bound to pay to the owner the price received for them, after deducting reasonable commissions and expenses. Or, if goods be delivered to a person who makes a business of conveying such goods from one place to another as freight, and who in legal phrase is termed a *common carrier*, as the owner of a wagon, canal-boat, steamboat, ship, or other public conveyance, the law raises an implied contract on his part to carry them safely and to deliver them in good order at the place or to the person appointed.

What is a bailment? Give some examples.

In all these and many other similar cases of bailment, there is an interest in the goods, called a *special* or *qualified* property, transferred to the bailee with the possession, giving him the right to keep such possession against any other person than the right owner, or his agent or legal representative. He may maintain an action against any such other person who injures or takes them away; for he being responsible to the bailor if the goods are lost or damaged, it is reasonable that he should be empowered to reclaim or protect them against injuries by others. He may also retain the possession even against the right owner, until his proper costs and charges are paid or tendered him by the latter.

A bailee is bound to use certain diligence in the care of the goods placed in his charge, or he will be responsible to the owner for any damages that may be sustained by their loss or injury. The degree of diligence he must use to avoid such responsibility varies in different cases. In order to give as much certainty as possible to the rules applicable to these different cases, the neglect which may render a bailee liable is divided into three kinds. *Slight neglect* is defined to be the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels. *Ordinary neglect* is the omission of that care which every man of common prudence and capacity takes of his own affairs. *Gross neglect* is the want of that care which every man of common sense, however inattentive, takes of his own property.

In general, when goods are delivered to be kept for the bailor, or to have something done with them at his request, as to be carried from one place to another, and the bailee

What interest is there transferred to the bailee? What are his rights to the possession of the property? How may he become responsible for the loss of the property? What are the different species of neglect and how are they defined?

is to receive no recompense, the latter is liable only in case of gross neglect, unless he had officiously and spontaneously offered his services.

But where the contract is for the mutual advantage of the bailor and the bailee, as when work and labour are to be bestowed on the goods delivered, or the owner is to receive hire for their use, or they are pledged as a security for a debt, the bailee is bound to use more diligence, and will be liable in case of ordinary neglect.

And where goods are simply borrowed, or placed in the hands of the bailee for his use or accommodation, without any compensation to the bailor, as the latter does not participate in any benefit to be derived from the bailment, the bailee will be liable for slight neglect.

An innkeeper who has the goods of a guest who seeks accommodation at his inn placed in his charge, is bound to use not only ordinary but extraordinary diligence for their preservation. There can be no excuse for his failure to keep them safely, but their loss by some unavoidable fatality which it was utterly out of his power to prevent, as if they were consumed by lightning, or taken by an army of the enemies of the country. If they are stolen by a thief, though without the fault of the innkeeper, that will not excuse him. But if the loss was occasioned solely by the gross neglect or misconduct of the bailor, the innkeeper would not be responsible.

A very similar degree of diligence is required of common carriers who have property intrusted to their charge, when acting in that capacity. Both innkeepers and common carriers are regarded as insurers of the goods of their

What species of neglect will render a bailee responsible when he derives no advantage from the bailment? When both parties are benefited? When the bailee only is benefited? To what extent are innkeepers and common carriers responsible for goods placed in their charge?

customers; and this unusual degree of responsibility is attached to them from motives of public policy. A carrier of passengers, however, does not warrant their safety at all events, but merely undertakes that as far as human care and foresight can go, he will provide for their safe conveyance. He is, therefore, liable for the personal injuries they may sustain, only when such injuries are occasioned by his or his agent's negligence or unskilfulness.

The loaning of money upon interest is a species of bailment. Here the person to whom the money is loaned contracts not only to pay back the principal sum, or the sum actually loaned, but also an increase or additional sum as a compensation to the lender for the use of the principal. This kind of contract may be made by the express agreement of the parties, but it is also implied by the law in all cases where a debt or sum of money is due from one person to another and should have been paid. It has been in use from a very ancient period, and it is so common that it has been deemed necessary, for the protection of the necessitous, who might otherwise be frequently tempted to make too great sacrifices, to regulate the amount of interest that may be lawfully charged, by statute laws.

In almost all countries, therefore, the statute laws fix the legal rate of interest; and any charge for the use of money beyond that rate is called *usury*. And as all contracts to do or perform any thing that is unlawful are void, a contract to pay usurious interest cannot be enforced. In some of the states, such a contract has been held to

Why is the law more rigid in their case? What degree of responsibility is there attached to the carriers of passengers? How are contracts for the payment of interest on money made? By what laws is the legal rate of interest fixed? What is a charge for the use of money greater than the legal rate of interest called? What is the legal effect of an usurious contract? What can there be recovered when there has been an usurious contract?

vitiate the whole contract of lending, so that not even the principal could be recovered. In other states, the principal may be recovered, but no interest; and in still others, perhaps, the principal and lawful interest may be demanded, but not the usurious interest.

CHAPTER XXXII.

OF CONTRACTS OF MARRIAGE, AND THE RELATION OF HUSBAND AND WIFE.

MARRIAGE, by the common law as well as by the statutory provisions made in reference to it in this country, is considered a civil contract, but one of a more sacred and solemn nature than ordinary contracts. From its nature and consequences there result certain peculiarities which it is necessary to notice.

In order to give a greater degree of solemnity to the marriage contract, it is customary to call in the aid of a clergyman or minister of the gospel, and to accompany the ceremony with suitable religious rites; or of a judge or other magistrate, to give to it the authority and publicity which may be derived from the participation of a recognised officer of the law. But the assistance of such persons is not necessary to render the contract valid. The actual agreement of the parties is sufficient for that purpose, and the forms and solemnities by which such an agreement is usually accompanied are only useful, in a merely legal point of view, as a means of securing certain and accessible evidence of the contract entered into.

What kind of contract is a marriage? How can it be entered into?

If two persons of opposite sexes enter into a valid agreement to marry, and either shall afterward refuse to perform the engagement, he or she will be answerable to the other, as in other cases, for such damages as may have been sustained by the non-performance of the contract. When the agreement has been executed by an actual marriage, the parties are called *husband and wife*, or, in the old law language, *baron and feme*; and the relation in which they stand together can only be dissolved by the death of one of the parties or by a divorce.

In general, all persons are able to contract a marriage, unless they labour under some particular disabilities. One of the first of these disabilities is a prior marriage, or the having another husband or wife living. Polygamy is condemned by the laws of the New Testament, and by the municipal regulations of all Christian nations. A second marriage in such case is absolutely void.

Another disability is the want of sufficient age; but the same age that would be requisite to enable persons to make ordinary contracts, is not necessary in this case. By the common law, a boy over fourteen or a girl over twelve years of age, might contract themselves in marriage. If they married under these ages, the parties might, when they came to the age qualifying them to consent, disavow the marriage, and declare it void without any divorce; but it was so far a marriage that if they then agreed to continue together, it was not necessary that they should be married again.

In some of the states of the Union, males are required

What are the consequences of a refusal to execute the agreement? How can it be dissolved when entered into? Who are able to contract a marriage? What is the first disability mentioned? What is the effect of a marriage when there is a prior husband or wife living? At what age could persons marry at common law? What was the effect of a marriage under such age?

to be eighteen years of age and females fourteen before they are able to contract a marriage; and in some of the states all persons are prohibited by the statute laws to solemnize a marriage, when the male is under twenty-one or the female under eighteen years of age, without the consent of the parent or guardian of the minor. But in the latter case, though the solemnizing a marriage would be an offence against the laws by the person officiating, the marriage itself would not be void.

One who is absolutely deprived of all reason, as an idiot or lunatic, is incapable of making any contract, and, consequently, cannot enter into a contract of marriage.

There are other disabilities, such as consanguinity, or relationship within the prohibited degrees, and some particular bodily infirmities; but these only render the marriage voidable, and do not render it absolutely void. It will be valid until sentence of divorce be obtained.

The causes for which a divorce may be obtained, and the manner of applying therefor, are generally regulated by the statute laws, in this country; though sometimes the legislatures of the states assume the power of granting divorces at pleasure.

After marriage, the husband and wife are considered but one person in law; that is, the legal existence of the wife is merged in that of the husband, under whose protection she performs every thing. The husband cannot contract with or grant any thing to his wife, for that would be to contract with himself; but he may do so through the

What do the statutes of some of the states require as to age? What prohibitory provisions are there as to solemnizing the rites of marriage? What is the effect of a marriage solemnized contrary to law? Can idiots or lunatics marry? Why not? What effect has the being within the prohibited degrees of consanguinity, or bodily infirmities, upon the contract of marriage? What laws regulate the granting of divorces? What legal union of persons does there take place upon a marriage?

medium of other persons, acting as trustees for his wife; and he may bequeath any thing to her by will, for that cannot take effect until after the marriage is terminated by his death.

The husband is bound to provide his wife with necessities suitable to his condition or circumstances, as much as himself; and if she contracts debts for them, he is obliged to pay them; but he is not chargeable for any thing but necessities. The husband is also bound for the wife's debts contracted before the marriage, for he adopts her and her circumstances together; and all her personal property becomes absolutely his, if he chooses to take possession of it. But if he does not actually reduce it to his possession, or by some act manifest his intention to do so, it remains her property, and after his death it will belong to her or her representatives, as fully as if the marriage had never taken place.

The husband is also entitled to use all the real property of the wife, and to take the rents and profits during the marriage; and if there be issue born alive during the marriage, he becomes what is called a tenant by the courtesy of England, and, as such, has an estate in all the real property of the wife during his life.

If the wife be injured in her person or property, she can bring no action therefor without the concurrence of the husband; and the suit must be in his name as well as hers. Neither can she be sued without making him also a defendant. Nor can she make any deed, or any conveyance of

What is the effect of that union upon contracts between the parties? What must the husband provide for the wife? What debts of hers must he pay? What rights has he to her personal property? What is the effect of his not reducing it into his possession? What rights has he to her real property? What change is made by his having issue born alive during the marriage? If she be injured, how must she sue? And be sued?

her real property, except by the consent and conjointly with her husband.

If the wife survive her husband, she is, by the common law, entitled to an estate for her life in one-third of all the real property which the husband was possessed of at any time during the marriage. This is called her *dower*, and she cannot be deprived of it by any act of the husband, without her consent. Consequently, if the husband desires to dispose of any part of his real property, in such manner that it shall not be subject to this right of dower, she must join with him in making the deed, and thus consent to the relinquishment of that right. So, if he undertakes to deprive her of her dower by will, or bequeaths property to her in lieu of her dower, she can, if she chooses, refuse to accept the provisions of the will, and claim her dower as if none had been made.

The statute laws of the several states differ very materially in their provisions respecting the rights of property incident to the relation of husband and wife. In some states, much of the control given to the former by the common law, over the personal as well as the real estate of the wife, is taken away, with the view of protecting her, and preventing her property from being dissipated by an improvident husband. In some states, also, her share of her husband's estate is enlarged; and, generally, she is entitled to a certain portion of the personal property of the husband after his death; and, if there be no issue of the husband, to a larger portion of his real property than she would obtain by her right of dower.

In criminal prosecutions, the wife may be indicted and

How can a wife convey away her real property? What rights has she to the real property of her husband? How can she be deprived of the right of dower? How can she relinquish her right of dower? Can she be deprived of it by a will? How do the statute laws of the states differ in their provisions on this subject?

punished separately, for the union is only a civil union. But in trials with other parties—and this holds good in criminal prosecutions, for then the state is a party—neither can be a witness for the other, except when the offence has been directly against the person of the wife. In some felonies, and other inferior crimes committed by her through the constraint of her husband, the law excuses her; but she cannot rely upon such constraint to excuse the commission of the crimes of treason or murder.

CHAPTER XXXIII.

OF CONTRACTS BY AND WITH INFANTS, AND BY AND WITH PERSONS STANDING IN THE RELATION OF PARENT AND CHILD.

THE age of twenty-one years has been fixed as the period when both males and females become of full age, which age is completed on the day preceding the anniversary of their birth. Until that day, they are styled in law *infants* or *minors*.

Infants are responsible for some acts, and they are capable of entering into some contracts which will be binding upon them; but they have various disabilities,

How may a wife be punished for criminal offences? Is she ever excusable for criminal acts done under restraint, and when? Can the husband or wife be witnesses for or against each other?

What is the period of full age in males and females? On what day is that period complete? Until that day, what are persons called?

which are intended as privileges to them, and to secure them from being imposed upon by persons who might be disposed to take advantage of their inexperience and immature understanding.

Thus, an infant cannot be sued but under the protection of and with his guardian, for the latter is to defend him against all attacks, as well by law as otherwise. But an infant may institute a suit, either in the name of his guardian or in that of some other person, who is then called his *prochein amy*, or next friend; for if his guardian refuses to act, or combines with others to defraud his ward, or if the infant should have no guardian, he might otherwise suffer loss.

In criminal cases, an infant is responsible at the age of fourteen, and is not held responsible before arriving at the age of seven years. Between those ages, it is presumed that an infant has not sufficient capacity to distinguish between what is lawful and unlawful; but if it appear, from his natural or acquired parts, that he does possess such capacity, he will be liable to the same punishment as persons of mature age. There have been instances in which both girls and boys have been found guilty of murder, and even executed, when they were no more than ten years of age.

It is the general rule, that an infant cannot make any contract whatever that will be binding upon him. But to this rule there are exceptions, which are made for his benefit. He may bind himself for his necessary meat, drink, clothing, physic, and for his teaching and instruction, whereby he may afterward derive profit. These are deemed necessities, and it is to his advantage to be able

Why are the disabilities imposed upon infants? How must an infant sue and be sued? What is a *prochein amy*? At what age is an infant held responsible for crimes? What is the general rule as to contracts by infants? What exceptions are there to this rule? What are necessities?

to contract for them, as otherwise he might suffer from the want of them. The degree, quality, or quantity of such necessities for which an infant may contract, will depend upon his fortune or circumstances. That is, if he possesses a good or plentiful fortune, he will be answerable for necessities corresponding therewith.

If an infant should be placed at a school by a parent or guardian, the infant would not be liable for the expenses thus incurred, for it would be implied that credit was given to the parent or guardian only. But a parent is not under any legal obligation to educate his child, and he cannot be made liable if the circumstances are such as to negative his assent to contract with the party who educated the infant. In the latter case, the infant alone is responsible.

An infant has also this further privilege, that though his deed or other contract, except for necessities, is not binding upon him, it will be upon those with whom he contracts, if he chooses to affirm or ratify the contract when he comes of age. That is, his contract is not absolutely void, but merely voidable, if he chooses or elects to repudiate it upon his attaining his majority.

Therefore, if he affirms the contract when of age—as if he had sold and conveyed a tract of land while yet a minor, and when of full age manifested his intention to consider the contract a binding one—it will be obligatory upon him. And as it is but reasonable that he should make his choice to affirm or disaffirm the contract as soon as he arrives at the proper age, if he does not then, or within a reasonable period thereafter, do some act to

For what quantity or quality of necessities may the infant bind himself? If the infant should be placed at school by a parent, who would be liable? What is the effect of a contract with infants as to those who contract with them? When must the infant disaffirm a contract if he desires to do so?

show its disaffirmance, he cannot do so afterward, and his right to make such an election will be lost.

While an infant remains under the care of a parent, and is supported by him, the infant is not liable to third persons, even for necessaries. Neither can the parent be made legally liable for necessaries furnished to a minor child, unless they were furnished under a contract with the parent, or under circumstances from which such a contract could be implied. If the parent suffer his children to reside with some other person, he impliedly constitutes such person his agent to contract for such necessaries as they may actually require. Or, if the necessaries were furnished at the request of the child at the residence of the parent, under circumstances indicating the assent of the latter, an authority to the child to make the contract would be implied, and the parent would be liable. But if there are no grounds for the supposition that the parent authorized the contract, he cannot be made responsible.

The father, in preference to the mother, has the right to the control of the children. Therefore, if the parents live separate, the father has, by the common law, an indisputable right to the care and custody of the children of the marriage. The courts, however, in England as well as in this country, have sometimes refused to enforce this right when the moral character of the father was notoriously bad; and in several of the states of the Union the statute laws now give the courts a discretionary power, when a conflict arises between a husband and wife for the possession of their children, to give the custody of the

When may a parent be obliged to pay for necessaries furnished his infant child? When does the parent impliedly constitute other persons his agents to contract for such necessaries? When the parents live separate, which has the right to the custody of the children by the common law? In what cases do the courts refuse to enforce this right? What change has our statute laws made in this respect?

latter to such one of the parents as shall appear the best qualified to take charge of them, and to afford them the greatest advantages.

The father has an interest in and may demand the proceeds of the labour of his children while under age, if they live with and are maintained by him; but if he permits them to live abroad and to maintain themselves by their own exertions, they will have the right to sue for and to collect the proceeds of their labour for their own benefit. The parent has no interest in any estate or property the child may acquire in his own right, either by his own contracts, or by descent, gift, or devise, except as his guardian.

The child owes obedience to the parent, and the law gives to the latter the right to use necessary and reasonable means to enforce such obedience. He may, therefore, inflict correction; for this is considered to be for the benefit of the child and the improvement of his morals and education.

The parent may also delegate part of his authority to those in whose care the child may be temporarily placed, as to a tutor or schoolmaster, who stands in the place of the parent for the time being, and has such a portion of the authority of the parent committed to his charge as may be necessary for the purposes for which he is employed. This delegated power of restraint and correction should, however, be temperately exercised. Reasonable punishments only can be lawfully inflicted. The exact limits cannot be defined, for what would be reasonable and necessary in one case would not be, perhaps, in another.

What interest has a parent in the proceeds of the labour of his child? When he permits the child to live abroad and maintain himself? What interest has the parent in the property of the child? What right has the parent to enforce obedience? How may he delegate that right? To what extent may punishments be inflicted?

Either parent or child may reciprocally protect and defend each other, and use the necessary force to do so, even if such force would be unlawful did not the parties stand in that relation toward each other.

The father, or, in case of his death, the mother, is the natural guardian of the person of the child, and by the common law was also the guardian of his property. But in most, if not all the states of the Union, the appointment as well as the powers and duties of guardians of the property are regulated by statute laws; and by these regulations the father, or any other person, may be appointed guardian, and, when so appointed, must conform himself accordingly. One person may be appointed guardian of both the person and property, but these offices may be conferred upon different persons.

The reciprocal duties and obligations of a guardian of the person and his ward are the same, for the time being, as those of a parent and child. It is the duty of the guardian of the property to take charge of all the effects of the ward, and to apply such portions thereof as may be necessary for the maintenance and education of the latter. When he becomes of full age, or before, if he has reason to believe that the trust has been unfaithfully discharged, the ward may require of the guardian a strict account of all his receipts and expenditures; and he may require the guardian to account to him for all profits made by speculations with his money or other property; but if such speculations have resulted in loss, the guardian will not be permitted to throw the loss upon the ward.

How may the parent and child protect each other? Who is the natural guardian of a child? How is the appointment of guardians regulated in this country? What are the reciprocal duties and obligations of a guardian and ward? What are the duties of a guardian of the property? For what must such guardian account?

CHAPTER XXXIV.

OF CONTRACTS BY AND WITH PERSONS STANDING IN THE
RELATION OF MASTER AND SERVANT, AND PRINCIPAL
AND AGENT.

THE cases in which persons stand toward each other in the relation called that of master and servant are, chiefly, where one is bound to another for a term of time by a contract of apprenticeship; where one is employed by another to work at some trade or calling; and where one is authorized to do some act or perform some service as the agent of another.

By an *apprentice* is understood a young person bound to another, for the purpose of being taught some trade or avocation. The apprentice is bound to observe with care and diligence the interests of his master, and to obey his reasonable orders; and the master is bound to furnish the apprentice with such necessities as he may require, and to give him suitable instruction. The master may correct his apprentice for negligence or other misbehaviour in his service, so that it be done with moderation; but he cannot delegate the power to do so to others.

The master may and it is his duty to protect his apprentice; and this right and duty is mutual. Either may justify himself for an assault in defence of the other, if that other be attacked, and a resort to force is necessary for his protection. The master may also claim compensa-

What are the cases in which persons stand in the relation of master and servant? What is an apprentice? What are his obligations? The obligations of the master? What are the powers of the master as to correction? As to protection?

tion for injuries done to his apprentice, whereby he is deprived of the services of the latter ; and, generally, he is responsible to the apprentice for the performance of all the duties required by the relationship existing between him and the apprentice, and of all the stipulations that may have been agreed upon in the contract of apprenticeship. These contracts are usually made by a parent or guardian on behalf of the apprentice, who is most commonly a minor, or by the minor himself with the consent of his parent or guardian.

Contracts between persons of mature age, or those having the ability to contract on their own account, for the performance of labour or services of various kinds, are very common. They are governed, as to the rights and obligations of the parties making the contract, by the rules heretofore stated. What we have here to notice is the responsibilities which either party may incur, with respect to persons who were not originally concerned in the contract.

These responsibilities are the result of the principles of agency, the first of which is, that that which one procures to be done by a servant or agent, may be regarded by any other person whose interests are thereby affected, as having been done by himself. A contract made by one who is authorized to act in that matter for another is, therefore, in law, the contract of the person for whom it was made. The person who makes a contract, in such a case, is called an *agent*, and he for whom the contract is entered into, the *principal*. The former is considered merely as the medium through whom the contract is effected.

How is the master responsible to the apprentice ? How are such contracts made ? Upon what principles do the responsibilities of persons standing in this relation with respect to third persons depend ? What is the first principle of agency ?

The leading principles which regulate the extent of an agent's authority to bind his principal are the same, whether such agent be employed for domestic services, or in commercial or other business transactions. In all cases, the act done by the agent must be within the scope of the authority given him, or his principal will not be liable, though he may be himself responsible.

An authority to act as the servant or agent of another may be given by an express contract, or it may be implied from the acts of the parties. Thus, if one is employed about the house or store of another, in the performance of any particular duties or services, with the knowledge of the master or principal, the public have a right to infer that such duties or services are performed under an authority given by the latter.

Agents are said to be either general or special. A *general agent* is one who is employed by another to act generally in any particular trade, business, or occupation; or where the agent is himself employed in any particular trade or business, and he be employed to do certain acts for another in that trade or business. In these cases, as the public have no means of knowing what private directions may be given to the agent, if the latter act within the general scope of his authority the principal will be bound, even although his orders may be violated. In such a case, the principal, having for his own convenience induced the public to believe that his agent was possessed of general powers, is bound by the exercise of the powers thus allowed to be assumed.

Thus, if a merchant employs a clerk to purchase or sell

What is the general rule as to the cases in which a principal is responsible for the acts of an agent? How may authority to act as an agent be given? What different kinds of agents are there? What is a general agent? For what acts of such an agent is the principal responsible? Why is he so responsible?

goods, he is bound by such acts of the clerk as are necessary or customary in the transaction of such business; or, if a person keeping a livery stable, and making a business of selling horses, should have a horse to sell and privately direct his servant to sell the horse without warranting his soundness, still, if the servant did warrant the horse, the master would be bound by the warranty, because the servant in making one acted within the general scope of his authority.

A *special agent* is one who is appointed for some particular transaction only; and in this case it is the duty of persons dealing with the agent to ascertain the extent of his authority. The master or principal will not be bound by any act of his not expressly authorized or fairly to be inferred from the terms of the authority given to him. One sent casually by the owner to sell a horse at a public market would be such an agent, and if he should act contrary to the orders given him the owner would not be bound by his acts. But if the person thus employed should be an auctioneer, or one who made a business of selling horses in such manner, it would be inferred that the horse was put into his hands to be sold according to the manner of his trade or calling, and he would be considered a general agent for such purpose.

But in any case, although the authority given be exceeded, the principal will be bound if he subsequently recognizes or assents to the agent's contract. Even although the contract be made without any authority whatever, it becomes the contract of the principal if it is ratified by him; and he is bound to disown the unauthorized act of

Give some examples of general agency. What is a special agent? What distinction is there as to the responsibility of the principal when the agency is general or special? Give some examples. How may a principal become liable by subsequently adopting the acts of an agent?

his agent as soon as it comes to his knowledge, or he makes the act his own.

So, an authority will often be presumed from the fact that similar acts had been previously done with the assent of the master. As if one should be in the habit of sending his servant to a store to buy goods upon a credit, he would be answerable for goods bought by that servant without his orders. It would be inferred, from his previous assent to such purchases, that the servant had a general authority to deal in that manner; and if the master had discontinued such an authority it was his duty to give notice to the persons with whom he had been dealing.

Upon the principle that the contract of an agent is the contract of his employer, an agent is not liable upon any agreement made in his representative capacity. But if he pledges his own credit, by concealing the fact that he is acting as an agent, or otherwise, or if he knowingly exceeds his authority, and his want of authority be not known to the person with whom he deals, the latter will have a right of action against him personally.

In general, whatever a servant or agent is permitted to do in the usual course of his business is equivalent to a general command; but it is not so with regard to acts which are not incident to the business intrusted to him. If I pay money to the clerk of a storekeeper or of a bank, the employer is answerable for it; but if I pay it to a schoolmaster's servant, who is not employed to receive money for his master, and he embezzles it, I may be required to pay it over again. If I usually deal with a

How may an authority be inferred from previous acts? Give some examples. In what cases may an agent become personally liable? Who is responsible for acts done by an agent which are not incident to the business intrusted to him? And why? Give some examples in which the principal or the agent, respectively, would be responsible?

tradesman myself, or pay him the money for what I obtain, I am not answerable for what a person in my employment might obtain upon trust, for there would be no implied order to trust my servant. But if I had been in the practice of sending him to obtain goods upon trust, or sometimes upon trust and sometimes for ready money, I should be answerable for all he obtained, for the tradesman could not be expected to know when he came by my order and when upon his own authority.

If one acting in the capacity of a servant or agent, by his negligence or misconduct in the performance of the duties intrusted to him, does any damage to third persons, the master or principal is responsible for the injury. If a blacksmith's servant or apprentice lames a horse while he is shoeing him, the master is liable for the damage. So, if the foreman of a newspaper office publishes a libel against an individual, the owner is responsible. In such cases, it makes no difference if the owner had forbidden his servant to do the particular act that occasioned the injury, if by a reasonable attention to his business he could have prevented it; for every one is bound so to manage a business carried on by him that others shall not be unnecessarily injured either by himself or those employed by him. But the damage must be done while the servant is actually engaged in his master's service, and in the performance of some act which the master had authorized him to do as a general or special agent. Otherwise, the servant would be alone responsible for his misbehaviour.

The same general rules are applicable to contracts made by persons in an official capacity. They are regarded as the agents of the government or some department thereof,

In what cases is the principal liable for the negligence of an agent? Give some examples. By what rules are contracts with public officers governed?

in the performance of the duties assigned to them. Therefore, a public officer is not personally liable upon contracts made by him in his representative capacity; nor can one sue an officer for money which the latter was authorized to pay him. But if the officer makes a contract not authorized by his office, or pledges his individual credit, he will be responsible. He may also, by his misconduct, render himself liable to a person thereby injured.

CHAPTER XXXV.

OF CONTRACTS OF PARTNERSHIP, AND BY AND WITH PERSONS STANDING IN THE RELATION OF PARTNERS.

A *partnership* is formed by two or more persons agreeing to enter into any bargain, or to conduct any trade or business for the purpose of sharing the profits or losses. This relationship may be created by an agreement in writing, or by the mere verbal contract of the parties proposing to form the partnership.

The right to participate in the profits and the liability to contribute to the losses of the undertaking, create a partnership, however unequal the shares may be, and although one of the parties may not furnish any of the capital employed, or have any right to a specified proportion of the profits. A man may, however, on entering into a partnership stipulate that, as between himself and

When are public officers personally liable and when not?
How is a partnership formed?

his copartners, he shall not be liable to the losses of the concern ; and, on the other hand, though a participation in the profits and losses may render one liable as a partner to strangers or third persons, such a participation does not create a partnership as between the parties, if the facts show there was no intention on their part that it should have such an effect. Thus, if a person let another have a sum of money to be employed in trade, upon an agreement that the profits should be equally divided between them, this would not constitute a partnership as between the parties, but would be regarded as a loan of money, although a creditor might have the right to regard it as a partnership for the enforcement of a claim arising from the business thus transacted.

And although a participation in the profits and losses is usually regarded as the criterion of a partnership, when the rights of third persons are involved, it will not be so considered where one agrees to accept a portion of the profits as a compensation for his services, and has no other interest in the concern. Thus, if one man should own a mill and another should agree to perform the necessary labour, and to receive a portion of the profits for his services as miller, this would not constitute them partners, even as to third persons—the share of the miller being only a compensation for his labour.

A *dormant partner* is one who is concerned in the partnership, but whose name is not publicly made known as one of the firm. Such a person is equally liable for all the contracts made by the firm, when discovered, with those who are held out to the world as partners.

What distinction is there as to what will be considered a partnership, when the rights of third persons are affected and when it is a question which affects only the parties? What exception is there to the rule that one who shares the profits may be regarded as a partner by third parties? Give an example. What is a dormant partner? To what extent is he liable?

A *nominal partner* is one who, without having any actual interest in the profits, or being in reality a partner, allows his name to be used as one of the firm. Such a person is liable as a partner to third persons, on all transactions in which credit is given to the firm on the faith of his being a partner. This rule is intended to prevent the frauds to which creditors would be exposed were parties allowed with impunity to afford to others the means of assuming an appearance of responsibility which they would otherwise be unable to do. On this ground, a mere representation by one person that he is a partner with another, or the permitting such a representation to be made without contradiction, if made with his knowledge, will render him responsible as a partner to a person furnishing goods on the faith of such representation.

The entering into a partnership constitutes each partner the general agent of the others, for the transaction of the partnership business and affairs. Consequently, in the course and management of such business as is properly incident to the purposes for which the partnership was formed, the act or contract of one partner is, in law, the act or contract of the whole firm, even although it should violate some private arrangement between the partners.

Although in a matter not connected with the partnership one partner cannot bind the others, the act or assurance of one partner made with reference to any business transacted by the firm, will bind all the partners. Thus, if two partners dealing in horses should agree between themselves never to warrant any horse, and one of them, upon the sale of a horse belonging to the firm,

What is a nominal partner? His liability? Give the reasons for these rules as to nominal partners. How are the principles of agency applicable to partners? In what cases will the assurances or representations of one partner bind the others?

should give a warranty, the other would be bound thereby.

So, in general, any one member of a trading partnership may bind his copartners by accepting, drawing, or endorsing a bill of exchange, or by making or endorsing a promissory note in the name of the firm; by selling or insuring the partnership effects; by receiving money for the firm; by releasing debts due to it; and by other acts or contracts of a similar nature, necessary or incidental to the carrying on the business of the firm.

One partner cannot sue his copartner in any ordinary action at law, for any claim in respect to the partnership accounts, or in any other matter connected with the partnership transactions. The reason of this is, that a court of law cannot, in such a suit, where a knowledge of the facts is generally confined to the parties themselves, do effectual justice between them; and, therefore, when a suit becomes necessary, they are required to apply to a court of chancery, where both parties can be compelled to disclose all matters connected with their affairs, and a full investigation and settlement of their accounts can be had.

But if the partners have a voluntary settlement and balance their accounts, and a certain sum is found due to one of them, the one against whom the balance is struck may be sued in an action at law for such balance; for in that case it would be unnecessary to resort to proceedings in chancery to obtain a settlement.

A partnership may be dissolved by the act of the parties, as by their mutual consent. When no specified time is fixed for its continuance, either party may dissolve it at

What may a member of a trading partnership, in general, do on behalf of the firm? How may one partner sue another? When there has been a previous settlement of accounts? How may a partnership be dissolved?

any time. The partnership will also be dissolved by the death of either of the partners, unless there is an express stipulation to the contrary; or when one of the partners becomes bankrupt. It may also be dissolved by the others, if one of the partners commits a wilful fraud or is guilty of other gross misconduct.

Upon the dissolution of a partnership, or when one of the members retires from the firm, it is usual, as a measure of precaution, to give notice thereof by advertisement in some public newspaper; for a person dealing with the firm, or with a former partner assuming the name of the firm after a dissolution, may still call upon all the original parties, unless he had notice of the dissolution, or knew that one of them had retired.

After the dissolution of a firm, each partner, unless there is an express agreement to the contrary, has power to receipt for and settle debts due the firm; and a payment made to any one of them will be good, unless the debtor have notice of an agreement of the partners that some one or more of them should not be entitled to receive such payment. But it is not in the power of any one of the members of the late firm to bind the others for the payment of a new debt, although it should be contracted for the payment of a prior debt for which the firm was liable. In other words, all power to make any new contracts ceases the moment the partnership is at an end; and each partner retains only such powers to act for the firm as are necessary for the settlement of such previous transactions as may remain unclosed.

Why should notice be given of the dissolution? What powers have the several partners after the dissolution as to the receipt of debts due the firm? As to the making of other contracts?

CHAPTER XXXVI.

OF CONTRACTS TO BECOME SURETY FOR OR TO GUARANTY
THE PAYMENT OF THE DEBT OF ANOTHER.

A *guarantee* is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is liable in the first instance.

The statute of frauds requires that an agreement to answer for the debt, default, or miscarriage of another person, must be in writing and signed by the person to be charged thereby. A contract to become a guarantor or surety for another's engagement is within this provision; and, therefore, no agreement to become collaterally responsible to fulfil an obligation for which another is first liable, can be enforced unless it has been reduced to writing.

A contract of this kind must also, as in all other cases, be supported by a sufficient consideration. Where the guarantee or promise, though collateral, is made at the same time with the principal contract, as if A purchases a bill of goods of B upon a credit, and C agrees to guaranty the payment of the sum due for them, no other consideration need be shown, for the whole is one original and entire transaction. Here the credit given to the principal debtor would be a sufficient consideration for the undertaking of the guarantor.

What is a guarantee? How is such a contract affected by the statute of frauds? What consideration is necessary when the guarantee is made at the same time with the principal contract? What constitutes the consideration in this case?

But if A had previously made the purchase, so that his debt had already been incurred before C agreed to become surety for the payment of it, his agreement could not be enforced unless there was some new consideration for the guarantee. This results from the invariable rule that no engagement can be enforced by law unless some legal right or benefit has been received by the party to be coerced, or lost by the other. Here, as the debt had been already incurred by A, the agreement of C would be a separate and distinct undertaking, which could not add any thing to the liability of A or detract any thing from the rights of B. But if B should, in consideration of C becoming surety for the debt due him from A, agree to give A a longer time for payment, or to deduct a portion of the sum due, or to accept a less rate of interest than he was originally entitled to demand, or to relinquish any legal right which he might have enforced, the case would be different, for then a new consideration would be raised.

There are various forms of writing by which one may become the surety of another, as by joining in a bond or by the endorsement of a note or bill of exchange, some of the consequences of which have been already noticed. It is not necessary, however, that there should be any writing signed by the principal debtor. An agreement signed by the person who is to guaranty the payment of the debt will be sufficient to create a contract of this character.

No particular phraseology or form of words is essential, provided the intention is sufficiently expressed to be clearly inferable. Thus, if I write to A, a merchant, "If you will credit B to the amount of five hundred dollars, I will

What consideration is necessary when the principal contract was made previously? Why is a new consideration necessary? Give some examples. What form of writing is necessary to make a guarantee? Give some examples.

see you duly paid," this will be a valid guarantee, and I will be bound to pay the money if B does not. So, if I agree in writing to accept a bill of exchange drawn by another, or engage to be answerable for any debts incurred by such other person in his dealings with a third person, for a specified length of time, or to a specified amount, I shall be legally bound to fulfil such engagement.

But if I merely express my belief in the solvency of a person, in a letter of introduction addressed to one with whom he wishes to deal, without expressly warranting his responsibility, this would not be a guarantee; though, if my representations were made with an intent to deceive the person to whom the letter was addressed, I being aware of their falsity, and such person should in consequence of my false representations trust the person recommended and lose his debt, he could compel me to make up his loss, upon the ground that I had damaged him by a fraudulent deception.

When one person becomes the surety or guarantor of another, his liability will not extend beyond the precise limits of his undertaking. Thus, if one guarantees the engagements of another to a certain amount, he cannot be made liable to any greater amount.

Upon this principle, if a person be surety for the fidelity of another in an office to be holden for a certain length of time, the surety will not be responsible for any defalcations occurring after that time has expired, though the officer may be reappointed, or may continue to exercise the duties of the office without authority. So, if a person engages as surety for a particular individual, the engagement is understood to extend to the acts of that individual alone, and it will not continue if he take a partner. In

What is the effect where an opinion or belief only is expressed? Of a representation intended to be deceptive? How far does the liability of a surety extend? Give some examples.

like manner, if a person becomes bound as surety for more persons than one, the engagement is understood to be on behalf of all those persons jointly; and in case of the death of any of them, it will not continue on behalf of the survivors, unless it appears very clearly that it was intended to be continued in such an event.

Any fraud practised by the person to be guarantied, for the purpose of inducing one to become a surety, will render the guarantee void. Therefore, if a creditor make any misrepresentations calculated to mislead one who is about to become the surety of his debtor, or suffer such representations to be made in his presence without contradiction; or if the creditor even fail to communicate to the surety any circumstances within his knowledge which it is material for the surety to know—although his failure to do so was not intentional or with a view to gain any advantage—the guarantee will be void.

So, any alteration of the terms of the original agreement by which the surety becomes bound, though made in good faith or without any intention to injure the surety, will exonerate the latter; for he is entitled to a strict and literal performance by the creditor of the contract in reference to which the guarantee was given. Thus, an agreement to guaranty the price of goods to be sold to a purchaser on a credit of twelve months, will not apply to a sale on a credit for any greater or less period. And any alteration of the date or amount specified in the instrument by which the surety became bound, or any change by which the terms of the contract are materially altered, made by the creditor or principal debtor without the assent of the surety, will release the latter, even although his liability might by such a change be apparently lessened.

What is the effect of a misrepresentation made to the person about to become a surety? Of withholding information from him? Of altering the terms of the agreement? Give some examples.

So, also, if the creditor, by any new contract made with the principal debtor, without the knowledge or assent of the surety, extend the period at which by the original contract the debt was to be paid, the surety is, as a general rule, freed from all responsibility. If, therefore, the holder of a bond, note, or bill of exchange which has been endorsed or assigned to him, and which was drawn payable in sixty days, should make a new agreement with the maker of the bond or note, or the acceptor of the bill, that the time of payment should be extended beyond that period, the assignor or endorser would be released from all liability, he being in law a surety for the party primarily liable.

When one becomes surety or bail for another, there is an implied promise on the part of the principal to indemnify the surety, in case he should be obliged to pay the debt or suffer any damage from his undertaking. Therefore, whenever the surety has been obliged to pay any thing for his principal, he has the right to demand of the latter the sum thus paid for him. There is also between sureties, when there are more than one, an implied contract to contribute equally in discharging the demands for which they become responsible for their principal; and if one pays more than the others, he may demand of the others their ratable proportion.

What is the effect of a new contract made by the creditor with the principal debtor? Give some examples. What implied contract is there between the debtor and his sureties? And between the sureties themselves, when there is more than one?

CHAPTER XXXVII.

OF THE CONTRACTS OF BANKRUPTS AND INSOLVENT DEBTORS.

THE word *bankrupt* is derived from *bancus* or *banque*, signifying the table or counter of a tradesman, and *ruptus*, broken ; denoting thereby one whose shop or place of trade is broken and gone. A bankrupt was formerly considered as a criminal or offender against the public ; but now bankrupt laws are looked upon as laws intended for the benefit of trade, and for the relief of the debtor as well as the creditor.

There are always two principal objects in any system of bankruptcy. One is to compel those persons who secrete their property, or do other acts tending to defraud their creditors, to surrender their effects, that they may be appropriated to the payment of their just debts ; and the other is to enable an unfortunate but honest debtor who, through unforeseen or unavoidable accidents, has become hopelessly involved, to surrender his property voluntarily, that it may be divided among his creditors, and he be released from his obligations, so that he may begin anew.

The constitution of the United States authorizes congress to establish uniform laws on this subject, which power, however, has been but sparingly exercised. An act to regulate the subject-matter was passed in 1800, and another in 1841, but they were

From whence is the word *bankrupt* derived ? What are the objects of a system of bankruptcy ? Where is the authority to establish such a system vested, in this country ? Are there any bankrupt laws now in force ?

both repealed within a very short time after their passage, and until 1867 there was no general legislation on the subject. Meanwhile, most of the states passed laws of this character, called insolvent laws, but these state laws could discharge no contracts made prior to their passage, and only such contracts as were made within their respective states and between citizens of the same. The principal object of these insolvent laws was to enable persons to avoid imprisonment for debt by the surrender of their property, but as imprisonment for debt was at different times entirely abolished in most of the states, the insolvent laws became in a great measure obsolete. They were finally superseded by the passage by congress of the Bankrupt Act of 1867, which of course renders inoperative all state laws in so far as they conflict with its provisions.

This act, which with various amendments is still in force, provides in substance that whenever a man becomes bankrupt his property, both real and personal, becomes vested in assignees, who have the same right to take possession of it or to sue for and recover it if necessary that the bankrupt himself would have had, had he remained solvent; a portion of this property is allowed to be retained by him as exempt, so that he shall not be entirely stripped of all his means. This portion is graduated according to what shall be deemed proper under all the circumstances of the case, not exceeding a certain sum specified by the bankrupt act and also the exemptions allowed by the statutes of the different states in force in the year 1871; the remainder is then converted into money by the assignee and divided among the creditors in proportion to the amount of their respective demands. After everything which the statute requires of him has been done, the bankrupt receives a certificate, granted by the court in which the pro-

What becomes of the property of the bankrupt under this law? How does the bankrupt become released from the payment of his debts? What kind of laws were there in the several states for the relief of insolvent persons?

ceedings were instituted, releasing him from the payment of the balance of the debts.

Both the bankrupt and insolvent laws being altogether of statutory creation, recourse must be had to the statutes on the subject, for information as to the laws which may be in force in any state at any particular time.

CHAPTER XXXVIII.

OF CONTRACTS BY AND WITH CORPORATIONS.

THE laws recognise two kinds of persons; namely, natural and artificial persons. As all personal rights die with the natural person, it has been found necessary, when any particular rights are desired to be kept or perpetuated, to constitute artificial persons, who may enjoy what is called a perpetual succession or legal immortality for any definite or indefinite period.

These artificial persons are called bodies politic, bodies corporate, or *corporations*. They are usually created by the legislature for the purpose of furthering some object of public benefit, as for the advancement of religion, learning, or commerce.

The nature and advantages of these artificial persons may be illustrated by taking the case of any certain number of persons who should desire to erect a building for

How must the state laws on this subject be ascertained?

What different kinds of persons are there in law? What are artificial persons called? For what are they created?

some common purpose, as for a church or seminary. They might, it is true, voluntarily unite their means and do so, but in that case the property could only be used for the purpose designed so long as they should all agree; and, as the individuals concerned should die or break off from the association, the building, with the land on which it was situated, and all the property connected with it, would be subject to division and distribution. Thus, the objects originally intended would be liable to be entirely frustrated within a very short period.

But when any number of natural persons are consolidated and united into a corporation, they and their successors are considered as but one person in law; and, as such, they may sue or be sued; make rules or regulations for their government; and appoint or elect officers to conduct their affairs. The privileges, immunities, and property of the corporation, when once vested in it, continue so long as it may last, or during the period for which it was created; for all the individual members that have at any time composed it form but one and the same person, in the same manner as a river or stream of water continues to be the same river or stream, though the parts of which it is composed are constantly changing.

These artificial persons were invented by the Romans, and were in use so early as in the time of Numa. They are always created, in this country, by an act of congress or of the state legislatures, or conformably to some general statute law on the subject. There are three principal kinds of them, distinguishing them according to the objects for which they are created.

Illustrate the nature and advantages of a corporation by an example. What acts may a corporation do? How do its privileges continue? What people invented corporations? How are they created in this country?

Municipal corporations, such as towns, cities, counties, and the like, are composed of the citizens who reside within the limits prescribed as the boundaries of such corporations, and have vested in them the corporate powers necessary for the local or municipal government of their district. They are, in fact, subordinate governments; and they usually have power to make by-laws and ordinances for the regulation of their local affairs, not inconsistent with the general laws of the state, or with the provisions of the acts or charters by which they are established. Such powers, however, are not of the nature of vested rights which cannot be resumed by the legislature granting them, but may be changed, revoked, or annulled at pleasure.

Religious, or, as they are sometimes called, *eleemosynary corporations*, such as churches, hospitals, or colleges, are incorporated chiefly for the purpose of enabling them to preserve the property necessary for their use.

Trading corporations, such as banking and insurance companies, canal companies, railroad companies, bridge companies, and the like, are usually created for the purpose of benefiting the public in some manner, while the members enjoy a profit by the use of the capital invested. This capital or the property acquired by it is called the *stock* or *capital stock* of the company; and it is commonly divided into a certain number of shares, which are owned by the natural persons forming the association. These shares may be sold or transferred from one individual to another, like other personal property, and entitle the

What are municipal corporations? Of whom are they composed? What powers have they? What vested privileges? What are religious or eleemosynary corporations designed for? What are trading corporations? What are they designed for? What composes their capital stock? How is it held? How may it be sold or transferred?

holder to a ratable proportion of the profits when made and divided.

The privileges granted to private corporations, as distinguished from municipal corporations, are considered as rights vested in them during the period for which they are created, by contract with the government, in consideration of the individuals composing the company investing their money for the public purposes which the corporation was designed to promote. The legislature cannot, therefore, unless the charter be violated by the company, take away or abridge those privileges, until the time limited for the duration of the corporation shall have expired.

The objects and purposes for which a corporation may make contracts, are always limited and defined by the charter or act of the legislature creating it. Within such limits it may, through its officers or appointed agents, make agreements that will be as binding as those of natural persons. These objects and purposes are usually such as are incidental and necessary to the kind of business which the corporation is intended to pursue; and all contracts foreign to such purposes or unauthorized by the powers conferred on the corporation, will be absolutely null and void.

In general, a corporation is only answerable for its contracts in its corporate capacity. It possesses an existence entirely separate and distinct from that of the individuals composing it; and it holds its property and performs its acts, and is responsible for such acts, in the same manner as a single and distinct individual would be under the like circumstances. Therefore, the property belonging to the

What vested privileges have private corporations? Why cannot those privileges be taken away or abridged? How are corporations empowered to make contracts? For what purposes may they contract? What is the effect of a contract which is unauthorized? How is a corporation answerable for its contracts?

corporation, in which however is included the amount paid in as capital by the stockholders, is alone answerable for its contracts or debts. The private property belonging to the stockholders, as individuals, cannot be taken for the purpose of enforcing the performance of such contracts, unless, indeed, it be expressly provided by the charter that the stockholders shall be individually responsible for the defaults or debts of the company, as is sometimes the case.

A corporation may be dissolved in various ways ; as by the natural death of all its members, so that there would be no one to succeed to its privileges ; or by the surrender of its privileges to the authority by which they were granted. It may also forfeit its charter by the neglect or abuse of its privileges, in which case, upon due process of law, it will be declared extinct, upon the ground that it has broken the conditions upon which its privileges were granted.

By the common law, when a corporation is dissolved, which is its civil death, all its real estate reverts to the person who granted it, or to his heirs, because a corporation can have no heirs or successors ; but this rule has been changed in some of the states, so that such property may be sold and divided among the creditors of the corporation, or among the original stockholders after the payment of the debts.

How far are the individual members responsible? How may a corporation be dissolved? How may it forfeit its charter? What is the effect of a dissolution upon the real property belonging to a corporation?

CHAPTER XXXIX.

OF THE MEANS OF ASSERTING AND ENFORCING RIGHTS
AND OBLIGATIONS.

HOWEVER important it is that the laws should define, as clearly as it is possible so to do, the rights to which each individual member of society is entitled, it is manifest that they would be incomplete, and inadequate to afford that security and protection for which they are designed, if they did not also afford means for settling disputed questions, and for the enforcement of those rights when violated.

If all mankind were so honest and just that each person would, voluntarily and without compulsion, promptly yield to every other that which rightfully belonged to him, and if the laws could be made so plain and comprehensive that they would clearly indicate the rights of all the parties in all the various transactions of life, there would be no necessity for remedial or vindicatory provisions. But, unfortunately, there are many persons who are not disposed honestly to accord to others the rights they are justly entitled to, without being forced to do so; and the transactions between individuals are so infinitely diversified, that it is often really difficult to determine the rights accruing to the respective parties in particular instances, as the declaratory parts of the laws can only prescribe or establish general principles. It is, therefore, absolutely necessary in every system of municipal law that there should be

Why is it necessary that the laws should provide means for their own enforcement?

some means provided for the investigation and settlement of disputed questions, and for the peaceable restoration of individuals to their rights, when they have been unlawfully deprived of them.

In England, the king is considered the fountain of justice. In very early times, as in other nations in a primitive state of society, it is probable that the kings in person often heard and determined causes; but, gradually, it was found necessary to delegate this duty to officers appointed for the purpose. As the nation increased in population, and the social relations of individuals became more complex and intricate in an advanced state of civilization, disputes were, of course, of more frequent occurrence; and, gradually, the business of hearing and determining complaints became so urgent and important as to require the services of a great number of persons, and the establishment of a variety of courts or tribunals, possessing authority to determine all disputes arising under the laws, and to enforce obedience in all cases of their violation.

Hence originated a distinct and separate arm of the government, called the judiciary department. This department is of vast importance to the rights and liberties of the people in all civilized countries; for however excellent or beneficial the laws might be in their intention, they would utterly fail in producing the good results anticipated, if they should be unfaithfully or but partially administered. It has been separated from the legislative and executive branches of the government, and, as far as is possible, made independent of them, in order to prevent its own assumption of undue powers on the one hand, and the danger of its decisions being controlled by a vacillating exercise of legislative or executive authority or by popular clamour upon the other.

How did the judiciary department of the government originate? Why is it separated from the other departments?

In England, however, all the powers of the courts are still supposed to be either mediately or immediately derived from the crown. They are said to be established by the authority of the king, on the theory that they are necessary to assist him in the administration of justice. Consequently, they are called the king's courts, and all their proceedings are entitled in his name.

In this country, the power of administering the laws, like all other governmental powers, is lodged originally in the people at large, they being the sole depository of all those attributes of sovereign authority which, in most other nations, are vested in some one or more individuals. It is by them, either immediately or through the medium of their representatives in the other departments, delegated to the persons who are appointed to exercise it; and all the proceedings of the courts are entitled in the name of the United States, or of the particular state by whose authority they are created.

CHAPTER XL.

OF COURTS IN GENERAL.

THE term *court* is derived from the Latin word *curia*, which signified a council-house or state-house, or more especially the place where the Roman senate or council

From whence are the powers of the courts of England derived? How are they established? In what name do their proceedings run? Where is the power of administering the laws originally lodged, in this country? From whence do those persons who exercise it derive their authority? In what name or names are the proceedings of the courts entitled?

How is the term *court* derived?

assembled to transact public business. In the law books it is defined to mean a place where justice is judicially administered.

This definition is, however, rather applicable to the court-house or hall where a court holds its sessions, than to the court itself, which is now understood to be a tribunal established to try and decide disputed questions pertaining to the legal rights of individuals or persons. It is only when some person complains of the violation of some right, or applies for the establishment or enforcement of some claim directly and really affecting his own interest or that of other persons who may be made parties to the proceedings, so that a judicial decision becomes necessary to settle the matters involved in the particular case presented, that the powers of a court of justice are called into requisition.

A court has no authority to give an opinion in a fictitious suit, or to declare what is or is not the law in any merely supposable case, for that would be an assumption of legislative powers, and a perversion of the purposes for which courts of justice are instituted. It is solely when a question bearing upon the rights of a party before it is legally presented for adjudication, that a binding decision can be made; and then the decision has reference only to that particular question and to the parties immediately affected by it, except so far as it may operate as a precedent when it may afterward become necessary to decide similar cases.

For the more speedy and economical administration of justice there are, in this country, as in England, a variety

What is it now understood to mean? When are the powers of a court called into requisition? What powers have courts to make decisions in merely supposable cases? What questions and what parties are affected by their decisions?

of different courts. Their power to hear and determine legal questions is termed their *jurisdiction*.

A court is said to have *original* jurisdiction when a suit may be first originated or commenced in that court; and *appellate* jurisdiction, when it possesses power to hear and determine appeals from the decisions of an inferior court.

A court has *exclusive* jurisdiction when a suit must be commenced in that court, and cannot be instituted in any other; and *concurrent* jurisdiction, when, as is often the case, the suit may be brought in that court or in some other, at the option of the person instituting it.

If a court having no jurisdiction of a cause brought before it, should nevertheless proceed to hear the parties and give a decision, such a decision would have no force or effect. It often happens, however, that it is necessary to determine whether the facts presented do or do not bring the case within the jurisdiction of the court. In other words, the court is obliged itself to decide whether or not it has jurisdiction; and in such cases, if it is authorized to hear such matters as are alleged to be involved in the controversy, its decision, though it may be erroneous, is not absolutely void, but remains binding and in full force until it is reversed or set aside by some superior court to which an appeal is taken.

A *court of record* is one where the acts or judicial proceedings are recorded on paper or parchment, and kept for a perpetual memorial or testimony of what was done in the premises. When so recorded in books prepared for the purpose, or filed away in the archives of the court, these writings are called *records*, and are of such high

What is the meaning of the term *jurisdiction*? What is meant by *original* jurisdiction? *Appellate* jurisdiction? *Exclusive* jurisdiction? *Concurrent* jurisdiction? What is the consequence if a court renders a decision in a case in which it has no jurisdiction? When a court erroneously decides that it has jurisdiction? What is a court of record?

authority as matters of testimony, that their truth is not permitted to be controverted by any proof. If there appears to have been any mistake made, the court, upon proper application for that purpose, will permit a record to be amended. But in all cases where the existence of a record is denied, it is tried upon the bare inspection, and when produced as evidence for any purpose, the matters stated in it cannot be questioned; as, otherwise, there would never be a settlement or an end of disputes.

The courts of this country are all created or established by statute laws, and these laws usually specify the matters that they are to have cognizance of; but their forms and modes of procedure, together with such incidental powers as are necessary for the effectual exercise of the authority expressly conferred upon them, are, in a great measure, derived from the common law. There are, however, certain inferior tribunals, sometimes called courts of special and limited jurisdiction, such as courts martial, which have no common-law powers; and, consequently, all their proceedings must be shown to have been strictly within the letter of the authority conferred upon them by the statutes establishing them, or their decisions will be of no effect.

Some of the inferior species of courts, such as those of justices of the peace, are held at any time when there is business to be transacted, and are supposed to be always open. But the higher courts are held only during certain periods fixed by the statute laws, which periods are called *terms*, and during which they sit and give judgments. That space of time between the end of one term and the

What are records? What is the extent of their authority as testimony? How must mistakes in them be corrected? How is the existence of a record tried? How are the courts of this country established? From whence do they derive their incidental powers? During what periods of time do the courts sit to give judgments? What are those periods called?

beginning of another, is called the *vacation*. The general powers of the court are suspended during this interval, and no final decisions or judgments can then be rendered; but, usually, the judges have authority to make certain kinds of orders necessary or incident to the progress of a suit pending in the court, such as an order to take testimony, or to stay proceedings on an execution; and such orders when made, have the same force and effect and are regarded as the orders of the court.

CHAPTER XLI.

OF THE COURTS OF THE UNITED STATES.

THE judicial power of the United States is vested, by the constitution, in one supreme court, and in such inferior courts as the congress may from time to time establish by law. The judges both of the supreme and inferior courts hold their offices during good behaviour, and receive a salary which may be increased but cannot be diminished during their continuance in office.

The courts which have been established pursuant to these provisions of the constitution, by various acts of congress, consist of district courts, circuit courts, and a supreme court.

What are the intervals during those periods called? What powers have the courts or judges during the vacations?

Where is the judicial power of the United States vested by the constitution? How do the judges of the federal courts hold their offices? State the different species of courts established under the laws of congress.

The *district courts*, which are the lowest in grade, are each held by a single judge appointed in the respective districts for the purpose. Formerly, each state generally constituted a district, but more recently some of the larger or more populous states have been divided into two districts.

These courts have jurisdiction, exclusive of the state courts, of all lesser crimes and offences committed against the laws of the United States, within their respective districts, or upon the high seas, where the punishment to be inflicted is a fine not exceeding one hundred dollars, or imprisonment for a period of time not exceeding six months; and also of all civil suits for penalties and forfeitures incurred under the laws of the United States.

They have also jurisdiction, concurrent with that of the state courts, of such other civil suits as, under the constitution and laws of congress, may be brought in the courts of the United States; such as those brought by a citizen of one state against a citizen of another, or by an alien for the violation of a treaty of the United States or of a law of congress, or such as may be brought by the United States or by any officer under their authority.

An appeal may be taken from the judgment of a district court to the circuit court, when the matter in dispute is of the value of more than five hundred dollars exclusive of the costs.

The *circuit courts* are held in *circuits*, formed by uniting two or more districts in such manner that the whole number of circuits shall be equal to the number of the judges

By whom are the district courts held? How are the districts formed? In what cases have they jurisdiction exclusive of the state courts? In what cases is their jurisdiction concurrent with that of the state courts? In what cases may appeals be taken from their judgments, and to what courts? By whom are the circuit courts held? How are the circuits formed?

of the supreme court. One of the circuits is assigned to each of those judges, who passes through the district composing it, and, by himself or in conjunction with the resident circuit judge and judge of the district court, or either of them, holds a term of the circuit court in each successively.

The circuit courts have jurisdiction, concurrent with the state courts generally, in all suits where the matter in controversy exceeds, exclusive of costs, five hundred dollars in value, and the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the state in which it is brought and a citizen of another state, or when the suit is brought under the laws of the United States granting to authors or inventors the benefit of their writings or inventions.

They have also exclusive jurisdiction of all crimes and offences committed within the district in which the court is held, against the laws of the United States, except those which are cognizable in the district courts, and of those they have concurrent jurisdiction with the district courts.

Suits cognizable in these courts, if commenced in a state court *against* an alien, or *against* a citizen of another state, or if the title to lands in another state be involved, and the matter in dispute exceeds five hundred dollars in value, may, under certain conditions, be removed therein for trial.

No one can be arrested in one district for trial in another in any civil suit; and no such suit can be brought in a circuit court against an inhabitant of the United States, unless he be an inhabitant of the district in which the

In what cases have the circuit courts jurisdiction concurrent with that of the state courts? In what cases have they exclusive jurisdiction? In what cases may suits commenced in the state courts be removed to the circuit courts for trial? Can a person be arrested in one district for trial in another in a civil suit? Or an inhabitant of the United States be sued in any other district than that in which he resides or is found?

court is held, or he be found there at the commencement of the suit, except in special cases.

When a difference of opinion occurs between the circuit and the district judges, when holding a circuit court, in cases appealed from the district to the circuit court, the judgment is to be rendered conformably to the opinion of the judge of the supreme court then sitting as a judge of the circuit court; but in all other cases of disagreement in opinion, the point may be certified to the supreme court for its decision.

An appeal may be taken from the judgment of a circuit court to the supreme court of the United States, in all cases where the value of the matter in controversy exceeds five thousand dollars, whether the suit was originally brought in the circuit court, or removed there from a state court, or brought there by appeal from a district court.

The *supreme court of the United States* holds one term annually at Washington City, and is composed of the judges of the circuit courts, who assemble at the appointed period, for the purpose of constituting this court. One of them is styled the chief-justice, and the others are called judges of the supreme court of the United States.

This court has exclusive jurisdiction in all suits or proceedings *against* ambassadors, or other public ministers from foreign countries, or their domestics, to the extent recognised by the law of nations. It has also original but not exclusive jurisdiction in suits brought *by* ambassa-

When there is a difference of opinion of the judges of a circuit court what is the result? When may appeals be taken from these courts, and to what court? Where does the supreme court of the United States sit? How many terms does it hold annually? Of what judges is it composed? How are the judges styled? In what cases has it exclusive jurisdiction where ambassadors, &c. are concerned? In what cases has it original but not exclusive jurisdiction when there are similar parties?

dors or other public ministers, or when a consul or vice-consul is a party.

It has also exclusive jurisdiction of all controversies of a civil nature where a state is a party, except in suits by a state against one or more of its citizens, or against citizens of other states, or against aliens, in which cases it has original but not exclusive jurisdiction.

This court has power to review and reverse any decision of the supreme court of a state, when the validity of a treaty or law of the United States, or of any authority exercised under such treaty or law is called in question; or when any construction has been given to any clause in the constitution, or to any treaty, or law of congress, or commission held under the government of the United States, adverse to the right, title, privilege, or exemption set up or claimed by either party to the suit in the state court, under the same. But such decisions cannot be reversed or disturbed for any other errors than such as immediately respect the said questions.

CHAPTER XLII.

OF THE STATE COURTS.

As the matters cognizable in the state courts embrace every thing of which the courts of the United States have not jurisdiction, and as, indeed, a great proportion of the

In what other civil cases has the supreme court of the United States exclusive jurisdiction? In what other cases has it original but not exclusive jurisdiction? In what cases has it power to reverse decisions of the state courts? For what errors may it reverse such decisions?

cases which may be brought in the federal courts—if the persons instituting them choose to avail themselves of their privilege to do so—may also be brought in the state courts, the latter are necessarily more numerous, and of greater variety as respects their powers and jurisdiction, than the courts established by the authority of the general government.

The states are divided into counties, and these again are subdivided into townships, in each of which there are usually one or more magistrates, called justices of the peace. This species of magistracy, like most of the parts which form our system of jurisprudence, had its origin in England.

It is asserted by some writers that justices of the peace were known in England as early as the reign of William the Conqueror; but by others it is said they were not made until the beginning of the reign of King Edward III., when they were thought necessary for suppressing commotions that might happen upon the dethroning of King Edward II., who had been deposed by the intrigues of his queen, Isabel. It is probable that, though the office may have existed previously in some parts of the country, it was not established generally throughout the kingdom until that period.

At first, the justices of the peace were a certain number of men of note in each county, who were chosen by the people to prevent risings or turbulent meetings, and to act as preservers of the peace generally. Subsequently, the power of appointing them was taken from the people and vested in the crown. Their powers and duties were defined by various acts of parliament, and the office gradually became one of very extensive usefulness.

What are the magistrates of townships called? From whence was this species of magistracy derived? How early were justices of the peace known in England? Of whom did they at first consist? How were they appointed?

In some of the older states of the Union, the justices of the peace are appointed by the governor, and hold their offices during life or good behaviour; but in those states in which the constitutions have been recently formed, they are usually elected by the people of their respective townships, and the tenure of their offices is limited to a fixed number of years.

Their powers and jurisdiction are given to them by the statute laws, and vary somewhat in the different states. They have usually, however, both criminal and civil jurisdiction to a limited extent. In common with almost all other judicial and police officers, they are *conservators of the peace* in their respective townships or counties. As such, they may apprehend all breakers of the peace, or all persons committing criminal offences in their sight, and require of them recognizances to keep the peace; and if such recognizances are not given they may commit the offenders to jail. But merely as conservators of the peace, they have no authority to try and punish individuals for offences, even if committed in their sight, and although breaches of the peace may be involved.

They have also, generally, authority, upon information being given to them under oath and in writing, to issue their warrants and cause to be brought before them any persons accused of felonies or other crimes, for examination. On such examination, they may hear such testimony as can be adduced, and, if the proof is insufficient, discharge the persons accused. If, however, there is in the opinion of the justice sufficient proof of the guilt of the person arrested, he may require such person to enter into a recognizance or give bail for his appearance at the next term of a superior court, to answer to the charge against

How are justices of the peace appointed in this country? How are their powers given to them? What are their powers as conservators of the peace? As an examining court?

him ; and if he cannot or will not give such bail, the justice may commit him to prison for safe keeping.

Besides these powers as conservators of the peace and as an examining court, justices of the peace are usually empowered by the statute laws to try and punish offenders for criminal offences of a light grade, such as misdemeanours which are punishable by a small fine only. In such cases, they either acquit and discharge the accused person, or find him guilty and render a judgment for the fine incurred ; and their judgments are final and conclusive unless appealed from, or set aside by a superior court for some error in their proceedings.

In civil cases, their jurisdiction is, in general, limited to actions in which personal property only is involved, and in which the amount in controversy is small. For the trial of such causes, they have powers similar to those given to other courts. They can compel the attendance of witnesses, summon jurors when necessary, and do all other acts necessary or incident to the jurisdiction conferred upon them. They are required to keep dockets, or books in which all their proceedings in each case are noted down, but their courts are not usually considered courts of record.

Aldermen, and some other city magistrates, have similar powers and jurisdiction to those of justices of the peace.

All inferior judicial officers are as solemnly bound by the law, both common and statute, as the judges of any court, though the same precision and technical formality are not required of them. The same facts that would be sufficient to maintain a suit in court, or to constitute a defence, would be sufficient for those purposes before a jus

What is the nature of their jurisdiction for the trial of criminal cases ? In civil cases ? What records do they keep of their proceedings ? What other magistrates are there having similar powers ? By what laws are they governed in cases brought before them ?

tice, and such as would not be sufficient in one case would not be in the other.

From the decisions of these magistrates, an appeal may generally be taken, by either party, to a court of general jurisdiction, which holds one or more terms in each year in every county. In most of the states, this court is held by a judge appointed for two or more counties composing a district or circuit. In some instances he is assisted by justices of the peace or associate judges, appointed for the counties in which they reside.

This court, besides hearing appeals from the decisions of magistrates, has original jurisdiction to hear and determine all suits whatever, whether of a civil or criminal character, unless, as is sometimes the case, certain portions of this jurisdiction are taken from it by the statute, and given to tribunals occupying an intermediate position between the county court of general jurisdiction and the inferior magistracy.

In large cities and other populous districts of country, where a great amount of business is thrown into the courts, it has been found necessary to divide it, by instituting several courts of record, each having general jurisdiction in cases of a particular character. In some instances these courts have concurrent jurisdiction one with another, and in some their jurisdiction of certain matters is exclusive. Their powers vary in different states, and sometimes in different sections of the same state, but there are always some one or more of them in which any suit or action known to the law can be prosecuted.

Above these courts, again, there is in every state one supreme court or court of errors, having appellate jurisdiction chiefly, and instituted for the correction of any

To what court may appeals from the decisions of magistrates usually be taken? How are the county courts held? What jurisdiction have they? How is their jurisdiction sometimes divided?

mistakes or errors that may have been made in the decisions of the courts of a lower grade. This is, therefore, the court of the last resort, and its judgment affirming that of an inferior court, puts a final and irrevocable end to the controversy between the parties, except in those cases in which, as before mentioned, an appeal can be taken to the supreme court of the United States.

In some of the states, the judges of the superior courts are appointed by the governor, with the advice and consent of the senate; in others, they are appointed or elected by the legislature; and in others, again, they are elected by the people at large. Their terms of office also vary. Some are appointed for life or during good behaviour, but the greater number hold their offices for a specified term of years.

CHAPTER XLIII.

OF THE OFFICERS OF THE COURTS.

BESIDES the judges, who preside in the courts and decide all questions of law that may arise in the course of the proceedings, there are certain other officers whose powers and duties are important.

The *clerk* is an officer attached to all the superior courts, to keep the necessary books and write down the important parts of the proceedings, constituting what is

What court of last resort is there in each state? What is the chief object of that court? What is the effect of a judgment by it affirming the judgment of an inferior court? How are the judges of the state courts appointed? What are their terms of office?

termed the record. His office is usually kept open during the vacations, and in it are filed and preserved all the papers and documents pertaining to the court. He also issues all necessary writs or process under the direction of the court, and has power to administer such oaths as may be required in the course of his duties. In most instances, the powers and duties of the clerks are explicitly defined by the statute laws of the United States, or of the several states in which the courts to which they are attached are held.

The *sheriff* was anciently an officer of great trust and authority. It seems that the government of each county was by the king lodged in an earl or count; but when this could not be commodiously executed by an officer so high in rank, it was the practice to appoint a person to officiate in his room or stead. Hence, the person so appointed was called in Latin *vice-comes* or *vi-count*, as being the deputy of the earl or *comes*; and sheriff, from the Saxon *shire-reve*, that is, governor of the shire or county.

As the keeper of the king's peace, he was the first man in the county, and superior in rank to any nobleman therein during the continuance of his office. He had authority to apprehend and commit to prison all persons breaking or attempting to break the peace; and it was his duty to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For such purposes, he had authority to command all the people of his county to attend him, who were then called the *posse comitatus*, or power of the county. Every person above fifteen years old, and under the degree of a peer, was bound to obey his summons under pain of fine and imprisonment.

What are the duties of the clerks of the courts? How did the office of sheriff originate? How is the title derived? What was the rank of the sheriff anciently? What authority had he? What was meant by the *posse comitatus*?

He was also bound to execute all process issuing from the king's courts of justice ; as, in the commencement of a suit to serve the writ ; when the cause came to trial, to summon and return the jury ; and when it was determined, to see that the judgment of the court was carried into execution. In criminal cases, the custody of the delinquent was committed to him, and he executed the sentence of the court, though it extended to death itself.

So great was the expense which custom had introduced in supporting the dignity of the office of sheriff, that it was found necessary, during the reign of Charles II., to make an enactment that no sheriff, except of London, Westmoreland, &c., should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery.

In this country, the sheriff is merely the ministerial or executive officer of the court. His duties are regulated by the statute laws, and are, generally, of the nature of those stated in the preceding paragraphs. He is usually elected by the people of his county, and holds his office for a term prescribed by law. He is required to give a bond, with security, for the faithful performance of the duties and trusts committed to him ; and both he and his securities are liable to the parties injured, for any losses resulting from his ignorance, carelessness, or negligence.

In the execution of the duties assigned to him, the sheriff has the common-law powers of the sheriffs of England ; and, to assist in the performance of his duties, he has under him several inferior officers, such as bailiffs,

What were his duties as an officer of the court ? What is the sheriff in this country ? How are his duties regulated ? Of what nature are they ? How is he appointed ? For what is he required to give security ? For what are he and his securities responsible ? What are the common-law powers of the sheriff ? What officers has he under him ?

jailers, &c. These are generally his deputies, and he is responsible for their acts.

In the federal courts, or those organized under the laws of congress, the chief ministerial or executive officer is called the *marshal*. His powers and duties are similar to those of a sheriff.

The office of *constable* is also one of very ancient origin. There were officers bearing that title in the Eastern Roman Empire, who possessed high military rank, and from thence the title appears to have been introduced into Europe. During the reign of Henry III., it was provided by a writ or mandate, that in every village or township, according to the number of the inhabitants, there should be one or two constables, who should act as conservators of the peace. This appears to be the first time that an officer of the character now known under the title of constable is mentioned by that name in the English books; but afterward such officers became familiarly known. They stand in the same relation to justices of the peace and other inferior magistrates that sheriffs do to the superior courts, and they possess similar powers in their appropriate sphere.

Sheriffs and constables, as conservators of the peace, may, if any breach of the peace or any criminal offence is committed *in their sight*, arrest the offender without a warrant. So, if a criminal be escaping from justice they may, without any warrant, pursue, arrest, and detain him until he can be taken before a magistrate. If men be making an affray in a house and the doors are shut, they may enter to preserve the peace; and if there be danger

How is the chief executive officer of the federal courts called? What are his duties and powers? When and where did the office of constable originate? When was it first known in England? What are the duties and powers of constables? What may sheriffs and constables do as conservators of the peace? When may they enter a house?

of manslaughter or bloodshed, and entrance upon demand is refused, they may break open the doors to gain an entrance.

When authorized to make an arrest, either with or without a warrant, they are authorized to use as much force as is necessary for that purpose. If the offender resists or flies, whether before or after arrest, and the officer be obliged, in self-defence or for the purpose of capture, even to kill him, the killing will be justifiable. But all other reasonable means to perform his duty must first be used. If the resistance can be overcome by less extreme means, the officer will not be justified in taking life.

Attorneys and counsellors at law are also officers of the courts. They are such persons as are admitted by the courts to appear and act in the place or stead of suitors by whom they are retained. As great trust and confidence as well as great authority are necessarily reposed in attorneys by their clients, they are themselves held to a strict accountability. They are liable to be punished in a summary way by attachment, or by being disbarred, for failing to pay over money collected by them, or for any ill practices attended with fraud and corruption and against the rules of common honesty.

They cannot be required, nor, indeed, will they be permitted to give evidence of the statements made to them by their clients—such communications being regarded as sacred. They are also responsible to their clients for any injuries sustained by the latter in consequence of their negligence or incompetence.

In the prosecution or defence of a suit at law, they have authority, in the name of their clients, to do any act pro-

When break open the doors to enter? What force may they use in making arrests? What are attorneys and counsellors at law? How may they be punished, and for what causes? What rule is there to protect communications made to them by clients?

per or necessary in the due course of such prosecution or defence, as to appear, plead, examine testimony, or to waive or dispense with the appearance, pleas, or testimony of the opposite party; and such acts bind their clients. Indeed, it was formerly held that if an attorney appeared, even without any authority to do so from the party in whose name he acted, his acts should bind such party. In other words, it was considered that his authority to act should not be controverted for the purpose of annulling the proceedings; and that a party injured by his unauthorized acts should look to him for redress. But this is not now the law. The acts of an attorney bind no one who has not retained him.

The attorney must pursue the strict line of his duty in the premises, or his acts will not be binding on his client. If he receives from the latter a note or debt to collect, he must take the proper legal steps to collect it according to its purport. If it is payable in money he can receive money only, unless specially directed otherwise; and if he agrees with the debtor to take a new note, or to receive other property in payment, or to compromise for a less sum than is due, without the knowledge or consent of his client, such an agreement will not be binding on the latter, and he may disregard it.

What powers have attorneys and counsellors at law in the prosecution or defence of a suit? Who are bound by their acts? What was the rule formerly, and how has it been changed? In what manner are they bound to pursue the strict line of their duty, to bind their clients?

CHAPTER XLIV

OF TRIALS.

TRIAL is the examination of a cause before a judge or court, having jurisdiction of the matters in contest and of the parties to the controversy, according to the laws of the land.

Of trials there are several modes or species, according to the difference of the subject or thing to be tried. Of these species, some that were anciently in use in England have long fallen into disuse, and were never, indeed, adopted in this country. They may, however, be briefly noticed as matter of curiosity, and to show the gradual progression of our ancestors in their notions respecting the administration of justice.

The trial by *ordeal* is one of the most ancient, and is said to have been of Saxon origin. It was founded on the notion that God would always interpose miraculously to vindicate the innocent when falsely accused. It was used only in criminal cases. When an offender was arraigned, and pleaded not guilty, he was at liberty to choose whether he would put himself for trial upon God and the country, that is, by twelve men, as at this day, or upon God only. If the latter mode was chosen, it was called the judgment of God, presuming that he would deliver the innocent.

There were several kinds of ordeal to which persons undergoing this species of trial were subjected. They were either by fire or water. In the water ordeal, sometimes

What is a trial? What is the origin of trial by ordeal? What idea was it founded upon? In what cases was it used? What were the kinds of ordeal to which persons were subjected?

cold water was used and sometimes the water was heated. In the cold-water ordeal, the suspected parties were adjudged guilty if their bodies were not borne up contrary to the course of nature. Sometimes they were to put their bare arms or feet into boiling water, and if no injury resulted, they were declared guiltless.

Those that were tried by the fire-ordeal, passed barefooted and blindfolded over nine red-hot ploughshares, or carried burning irons in their hands, usually of one, two, or three pounds weight. Accordingly as they escaped injury, they were adjudged innocent or guilty. The fire-ordeal was used for freemen and persons of the higher orders. The water-ordeal was for bondmen and those of humble condition.

Trials by ordeal were condemned by the Church of Rome as absurd and barbarous, and they were consequently abolished in England by an order of council during the reign of Henry III.

The trial by *wager of battle* was introduced into England by William the Conqueror, and seems to have owed its origin to the military spirit of the Northern nations, who were then conquering and occupying the principal countries of Europe, as well as to the superstition and religious enthusiasm for which they were so remarkable. This mode of trial, though fallen into disuse, might still be claimed in England until very recently. It was not formally abolished by law until the year 1817 or 1818.

The manner in which it was conducted, in a criminal case, was somewhat as follows:—The prisoner, upon being arraigned, pleaded not guilty, and then flung down his glove, saying that he was ready to defend the truth of his plea by

How were the parties tried by the water-ordeal? How by the fire-ordeal? When were trials by ordeal abolished, and how? When was the trial by wager of battle introduced, and by whom? When was it formally abolished in England?

his body. If the accusing party was willing to join battle, he took up the glove, and said he was ready to maintain the truth of his charge upon the body of the prisoner. The prisoner then laid his right hand upon the Holy Bible, taking with his left hand the right hand of the accuser, and made solemn oath that he was innocent of the crime charged. The accuser then laid his right hand upon the book, with his left taking the right hand of the accused, and made oath that the accused was guilty. This being done, the court appointed a day and place for the battle, and in the mean time the prisoner was kept in custody of the marshal.

A piece of ground was then in due time set out for the place of combat, and on one side of it a court was erected for the judges and the learned sergeants at law, who attended in their robes. Ordinarily, the weapons of the combatants were only batons or staves; and, as they were provided with four-cornered leathern targets, death very seldom ensued.

When the champions, thus armed, arrived within the lists, they severally made oath to the truth and justice of their cause, and that they had neither ate nor drank that day, nor done any thing else through any enchantment, sorcery, or witchcraft, whereby the law of God might be abased or the law of the devil exalted. The battle was then begun, and the combatants were bound to fight from sunrise until the stars appeared in the evening. If the accused party could defend himself until the stars appeared, he was entitled to have judgment of acquittal; but if he was so far vanquished during the day that he could not or would not fight any longer, he was adjudged guilty, and in criminal cases might be hanged immediately.

Trials by *jury* are of great antiquity. Some writers

state that juries were in use among the Britons. Others are of opinion that this mode of trial was introduced by the Saxons. It seems, in fact, to have been used by all the Northern nations, and though for a time it was partially superseded by the introduction of the Norman trial by battle, it was always highly esteemed by the people, and has long been considered one of the principal bulwarks of English liberty.

By the constitution of the United States, the right of a trial by jury is secured to every person accused of crime or prosecuted in a civil suit, at common law, where the value of the matter in controversy exceeds twenty dollars. There is a similar provision also in the constitution of each of the states.

In proceedings in chancery, in suits at common law when the value of the matters in controversy is less than twenty dollars, and in cases of petit misdemeanours, or slight offences against the laws not included under the denomination of crimes and punished by fines of small amount, the causes are sometimes, under the laws of the several states, tried by the judges or magistrates without juries. And when a party is entitled to a trial by jury, he may waive his right if he chooses to do so. Any cause may, therefore, be submitted to the decision of the judge or judges presiding over the court, by the consent of all the parties, or their agreement to waive the intervention of a jury.

By what people were trials by jury introduced? What are the provisions of the constitutions of the United States and of the several states respecting trials by jury? In what cases do the laws provide for trials without juries? How may the right of trial by jury be waived?

CHAPTER XLV.

OF PLEADINGS.

THE *pleadings* are the mutual statements or altercations of the parties to a cause, showing the matters in dispute between them. Formerly, the parties made their statements orally, or by word of mouth, and they were minuted or written down by the clerks. But at the present day, in all or almost all courts, the plaintiff, or person who institutes the suit, is required to file a written statement of the matters he complains of, and the defendant is then required to furnish an answer, also in writing.

Sometimes the answer of the defendant is of such a nature that the plaintiff finds it necessary to reply to it, the defendant to answer again to this reply, and so on until the parties arrive at a point where something is alleged upon one side and denied upon the other, in a manner to be presently explained. These mutual statements and answers in writing are the pleadings. There is a popular idea that the speeches or arguments of the attorneys or counsel, when commenting on a case before the judges or jury, are pleadings; but these are not what is understood by that term in legal parlance.

The statement of the matters complained of by the plaintiff, or the person coming to the court to make a complaint, was anciently called the *narratio*, *count*, or *tale*, it being simply the narration of his cause of complaint at length. It is now called a *declaration*, *bill of complaint*,

What are the pleadings? How were they formerly made? How are they now commenced? What was the statement of the cause of complaint formerly called? What is it now called?

cause of action, petition, &c., according to its nature and the practice of the court in which the suit is commenced.

One of the first and most obvious requisites of such a statement is, that it should contain a narration of such facts as, if the statement should be in all respects true, would entitle the plaintiff to some redress. It would, of course, be unnecessary and profitless for the courts to occupy their time in investigating the truth of the facts alleged, if those facts when admitted or proved would not constitute any legal cause of action.

Suppose A should sue B, and allege in the statement of his cause of action that he purchased a horse of the said B, paying him one hundred dollars therefor, and that the horse proved of but little value, wherefore he desired to have damages. Here, if all that is alleged should be admitted by B to be true, A would not be entitled to recover any thing, because there is no law by which he could claim damages for losses sustained merely by an injudicious bargain. Neither could B, if such a transaction had occurred, deny the truth of the matters stated; but he could very properly say to the court or magistrate before whom he was summoned—"This suit ought not to be prosecuted against me, because A has not alleged any thing which, in law, would entitle him to maintain an action."

He would naturally, therefore, in such a case as this, when called upon to answer the plaintiff's declaration or cause of action, reply that the plaintiff's declaration was not sufficient in law or contained no sufficient facts to entitle him to maintain his suit, and pray the judgment of the court whether he should be required to make any other answer.

This would be what is called a *demurrer*, and it is the

What is the first requisite of a statement of the cause of complaint? Why should it have this requisite? Give an example. What is a *demurrer*?

course adopted when the defendant thinks the plaintiff does not state a case that shows any legal ground of complaint. It offers what is termed an *issue of law*, which is thus presented to the court for decision; and if sustained, there can be no necessity for proceeding further with the trial. The plaintiff must go out of court, as a matter of course; for the effect of the decision would be, that if he proved every thing he alleged to be true, it would be of no avail, for he would not then be entitled to any relief.

Generally, however, even after it has thus been decided that the cause of action shown by the plaintiff is insufficient, the latter will be allowed to amend it, by supplying any defects or adding any additional facts that would obviate the objections to it, if he can do so; and when the cause of action is thus made good, or if it should be decided to be good in the first instance, the defendant must make another kind of answer; for if the plaintiff offers to prove a lawful cause of complaint, he will be entitled to relief, unless the defendant can show some reason to the contrary.

Thus, if A, in addition to the matters stated in the cause of action just adverted to, had added the further statements, that at the time he purchased the horse, B warranted the animal to be sound, and it turned out that he was unsound, A would have shown a sufficient legal cause of complaint; that is, he would have shown that he was entitled to have damages from B, because the horse did not prove to be sound, though warranted to be so. B could not, therefore, demur, or say that the matters charged would not constitute a sufficient cause of action; but if he desired to defend himself against it, he would

When is it used? What is the issue made by a demurrer called? What is its object? How may the cause of action be amended? If the cause of action is a good one, what must the defendant do? Give an example.

be obliged to put in some plea or excuse, showing either that A had not brought his suit properly, or that the facts stated by him, or some of them, were untrue, or that notwithstanding the suit was properly brought and the truth of the facts alleged, there were some other facts which showed that the plaintiff was not entitled to any relief.

Pleas making an objection to the manner of bringing the suit, as to the jurisdiction of the court, the form of the writ or process, the misnaming of either of the parties, and the like, are termed *dilatory pleas*, or *pleas in abatement*. The object of such pleas is to obtain a decision, preliminary to the investigation of the matters in controversy, whether the court will entertain cognizance of the suit.

Formerly, such pleas were often used without any foundation in truth, for the mere purpose of obtaining delays; and, to prevent their abuse for such purposes, they are now usually required to be filed within a limited time, and to be verified by the oath or affirmation of the persons making them. They are called pleas in abatement, because, if successful, the suit must abate or be dismissed—for the reason that the court has no jurisdiction to hear it, or that it has not been properly presented.

Pleas denying the truth of the matters stated in the cause of action, may consist of a general denial of all the material facts so charged, or of a denial of some one particular allegation forming a necessary link in the chain of facts stated by the plaintiff. A plea denying in general terms all the facts alleged by the plaintiff, is called *the general issue*, because it is a general denial of the plaintiff's right of action, and questions or puts at issue all the facts

What are dilatory pleas? By what other term are they called? What is their object? What restrictions are there as to their use? Why are they called pleas in abatement? Of what may pleas denying the truth of the matters charged consist? What is the general issue?

necessary to establish such a right. It is the proper plea, and it is in general necessary, except in those actions which do not admit of its being pleaded, when the defendant merely relies upon the plaintiff being unable to prove the truth of the matters charged by him, or upon his own ability to prove their falsity.

Whenever one party denies all the facts or any material fact charged by the other, with the intention of resting his case on the truth or falsity of such fact or facts, the question thus raised is called an *issue of fact*; and the party making the denial and thus raising the question, always makes an offer to submit it to the decision of a jury. This offer is called *tendering an issue to the country*, or to twelve impartial men, selected from among the citizens of the country, for their decision. It, of course, imposes upon the plaintiff the necessity of proving the facts so denied; because, as he has asserted their existence, and their existence is necessary to sustain his cause of action, it is but reasonable that he should be required to prove that they do exist.

But if a plea does not deny all the facts alleged by the plaintiff, those that are not denied will be regarded as true; for it is a rule in pleading that when one party professes to answer the previous allegations of the other, he admits the existence of all the material facts which he does not deny; because, if he does not choose to deny all the facts alleged, but prefers to rest his case on some one or more points, it would be entirely unnecessary to enter into an investigation of matters which he has no wish to dispute. This rule is as much for the benefit of one party as

When should the general issue be used? What is an issue of fact? What is meant by tendering an issue to the country? What does such an issue impose upon the opposite party? What is the effect if the plea does not deny all the facts charged? Why are the facts not denied considered to be admitted as true?

the other, for it might add greatly to the expense and delay of trials if it was necessary to procure the attendance of witnesses, or collect other necessary evidence, to prove a multitude of facts which neither party wished to question.

CHAPTER XLVI.

OF SPECIAL PLEADING.

It often happens that the plaintiff's cause of action shows an apparently lawful demand, and all the facts alleged in it are consistent with the truth, and yet the plaintiff is not entitled to recover because of some further and other facts not yet divulged.

We have seen, in a former chapter, that infants cannot make any contracts which will be binding upon them except for necessities. Suppose, then, as an instance to illustrate this subject, the defendant was an infant at the time the contract alleged by the plaintiff was made. If such was the case, he might plead that fact as an answer to the plaintiff's cause of action.

But, as in such a case, the defence would not rest upon the ground that any thing alleged by the plaintiff was untrue, but upon the truth of a new fact alleged by the defendant, it is right that the burden or necessity of making proof should be transferred to the latter. He must, therefore, instead of demanding proof of the plaintiff by tendering an issue to the country, aver his own readiness to prove what he says is an answer to the plaintiff's demand.

A plea of this kind is called *a special plea in bar*, be-

cause it sets up some particular fact or facts to bar or preclude the plaintiff's right or cause of action. It is also called a *plea of confession and avoidance*, because it confesses or admits the facts alleged by the plaintiff, but seeks to avoid their consequences by the introduction of some new matter, which shows that, notwithstanding the truth of all the plaintiff has charged, there is yet some principle of law, shown to be operative by such new matter, which will prevent his recovery. The form of such a plea is briefly as follows:—

“The defendant comes and says the plaintiff ought not to maintain this action, because at the time of the making the contract in the declaration mentioned, the defendant was a minor under twenty-one years of age; and this he is ready to verify.”

Here the defendant impliedly admits there was such an agreement as that alleged by the plaintiff, but places his defence on the ground that he was not of sufficient age to be capable of making a contract. He also avers his readiness to prove that he was a minor and to rest his defence on that ground alone.

If, then, the plaintiff is also ready to rest the decision of the cause on that question, it becomes his turn to deny the fact thus set up, and tender an issue to the country. In order to do this, he would make what is called a *replication*, in something like this form:—“And the plaintiff, for replication to the plea of the defendant, says, the said defendant at the time of the making of said contract was not a minor under twenty-one years of age; and of this he puts himself on the country.”

Why is it so called? Give an example. By what other term is it called? Why is it so called? What is the form of such a plea? What does the defendant admit by such a plea? On what ground does he place his defence? If the plaintiff desires to rest the decision of the case on the question raised by the plea, what does he do?

But though, so far as has yet appeared, the fact stated in the defendant's plea might show a sufficient ground of defence, the plaintiff might have it in his power to prove still other facts which would show that such a defence was not available. For instance, it might have been the case that though the defendant was a minor when the contract was made, he had afterward become of age, and had then ratified and affirmed it. If it was so, the disclosure of this fact would render the defendant's assertion that he was an infant when the contract was made, of no avail, because the contract would have been made binding by its subsequent affirmance.

In such a case, the plaintiff, instead of denying the infancy and tendering an issue to the country, would make a replication asserting this new fact, and averring *his* readiness to prove it. Here, again, he would admit the truth of the fact stated by the defendant, but, in his turn, avoid it by the assertion of another fact; and as what he asserted in his original cause of action was admitted by the defendant, if the latter simply denies the replication, the whole case will turn on the single question whether the new fact alleged in it be true or not.

But, possibly, the defendant might be able again to confess and avoid the effect of the fact stated in the replication. For instance, as any act which may be procured to be done by fraudulent means is of no force or effect, he might *rejoin* that the affirmation of the contract was obtained from him by fraud. His rejoinder, in that case, would be in something like this form:—"And the defendant says the said affirmation in the plaintiff's replication

If the plaintiff could avoid the effect of the facts stated in the plea by introducing other facts, what would he do? What would he then admit? On what would the case then turn? If the defendant could confess and avoid the facts stated in the replication, what would he do? What would be the form of his rejoinder?

mentioned, was obtained of him by fraud and deceit; and this he is ready to verify." To which the plaintiff, if he wished to deny the fraud, would answer:—"And the plaintiff says said affirmation was not obtained by fraud; and of this he puts himself on the country."

When the parties had arrived at this point in the pleadings, the defendant would be obliged to accept the issue thus offered by the plaintiff, and would signify his acceptance by adding the words—"And the defendant doth the like." This simply means, that as the plaintiff has offered to rest his case on the truth or falsity of the fact last averred by him, to be ascertained by a jury of the country, the defendant is content to do so likewise. It is called *adding the similiter* or *joining the issue*; and the only question then to be ascertained would be, whether the affirmation of the contract by the defendant after he had arrived at the age of majority, was obtained by fraud or not—all the other facts involved having been admitted by the previous pleadings.

It is to be observed that whenever an issue, whether of law or of fact, is properly tendered, the other party has no option but to accept it. Thus, if the defendant demurs to the plaintiff's cause of action, and raises an issue of law as to its sufficiency, the plaintiff must join the issue and submit it to the judges of the court for their decision. And so, as an issue of fact is always raised by the denial of some material fact or facts alleged by the opposite party, nothing remains for the latter but to accept or join in it, and permit it to go to the jury for their determination.

But this rule is only applicable when the issue is well or

How would the plaintiff reply to it? How would the defendant then add the *similiter*, or join issue? What does joining issue mean? When an issue is properly tendered, what must the other party do? If it is an issue of law? If it is an issue of fact?

properly tendered. Therefore, if the opposite party thinks an issue of fact is improperly tendered, as if the plea should set up new matter, and not be simply a denial of facts previously alleged, and yet tender an issue to the country, instead of concluding as it ought with a verification or offer of proof,—or that it is bad in form or substance, for any other reason,—he is not obliged to join the issue, but may demur.

And so, when either party sets up new facts in confession and avoidance of the previous pleadings of the other, the latter, if such newly alleged facts would not constitute any legal avoidance, is not obliged to deny them and tender an issue to the country, but may demur to them, and thus tender an issue of law to be decided by the judges.

The use of a demurrer is to obtain the opinion of the judges of the court, whether the facts stated by either of the parties would be, in law, sufficient to sustain the positions assumed by them in the prosecution or defence of the suit; for if they would not be, there would be no use in referring the question, whether such facts existed or not, to a jury. In the example given in the preceding chapter, the demurrer is applied only to the declaration; but if the declaration was sufficient, and the defendant had not set up a defence in his plea that could be sustained on legal grounds, the plaintiff could have demurred to the plea; and so it might be used by either party at any stage of the pleadings.

From the preceding examples, it will be easy to perceive the outlines of the system of pleading in use in suits at common law. It is simple in its inception, and, in many respects, admirably adapted to the purposes had in view;

But if an issue is improperly tendered, what may the other party do? When facts are set up in avoidance which would not constitute a legal avoidance, what may the other party do? What is the use of a demurrer? At what stages of the pleadings may it be used?

namely, to narrow down the controversy to those points really disputed or denied by the parties; thus avoiding the necessity of adducing proof as to facts which are not denied, and terminating the dispute without further investigation, when one of the parties cannot respond to the previous pleadings of the other by the assertion of facts which would be a legal answer.

Each party is bound to prove the material facts asserted by him and no more; and, of course, it would be folly to assert facts which he could not prove and does not expect to prove. Therefore, when he has made as strong a case in his pleadings as he can possibly make by his proof, if his pleadings are demurred to and decided to be insufficient in law, there should be an end of the case, unless, indeed, the decisions of the court upon the questions of law thus raised should be appealed from; and then there can be no occasion for an investigation of the facts.

As in other branches of the law, owing to the vast multiplicity of facts, and the infinite complication of circumstances which occur in the commerce of mankind, and which, therefore, become the subjects of pleading in suits at law, it has been found necessary to adopt various rules and regulations which cannot be here explained. What has been said, with a few remarks yet to be made, will give the student an understanding of the general system.

All the mutual altercations of the parties in arriving at issues of law or fact are, as has been before stated, called the pleadings. They are, however, also distinguished by particular appellations. The cause of action filed by the plaintiff, is usually styled the *declaration*; the answer to that by the defendant, a *plea*; the reply to the plea, the

What are the purposes had in view in this system of pleading? When should a demurrer put an end to the case? What are the mutual altercations of the parties, in pleading, called?

replication; the answer to that, a *rejoinder*; and the answer to a rejoinder, a *surrejoinder*.

This is as far as the pleadings are spun out in the example given, and it is very seldom they reach further. There are, however, some instances in which the defendant answers a surrejoinder by a *rebutter*, and the plaintiff that by a *surrebutter*.

As it is a rule that the parties are required to prove what they allege and no more, it is, of course, an object with them to assert no more than is absolutely necessary; but sometimes they may entertain doubts as to the precise facts which will sustain them in law. Hence arises the practice of putting more than one count or cause of action in the declaration, and of pleading several pleas to the same count or cause of action.

The plaintiff may, in his declaration, claim several distinct debts or demands, each of which will stand as a separate cause of action; and he may state one and the same demand in several forms, or with variations as to the facts, as if they were distinct debts or demands. This is frequently done, with the view that if one or more of the counts or alleged causes of action shall be decided to be insufficient upon demurrer, the others, or one, at least, may be held good.

In like manner, the defendant often pleads several pleas to the same cause of action, having a similar object in view; for as each plea to the whole cause of action must state facts that would be sufficient to bar the suit, if any one plea can be sustained by proof, the plaintiff must fail.

What is the reason for putting more than one count in a declaration? How may the plaintiff state his claims in his declaration? With what view is the same demand sometimes stated in several forms? Can the defendant plead more than one plea to the same cause of action? Why does he sometimes plead more than one plea?

If any of the pleadings are obviously frivolous or improper, it is not necessary to resort to a demurrer, as the court will order them to be stricken out, upon its attention being called to them.

CHAPTER XLVII.

OF ACTIONS IN GENERAL.

AN *action*, or suit, is the form of proceedings given by law for the recovery of that which is one's due ; or for the legal demand and establishment of some right which is disputed, withheld, or which requires some process under the laws to be obtained or recognised.

The wrongs or injuries which persons may sustain by the deprivation, detention, or seizure of their rights, are of very various nature ; and the remedies, in order effectually to afford suitable and complete reparation, must also be various. For this reason—the force of which will be more clearly perceived as we come to note the peculiar use and objects of the several kinds in common use—the Greeks and Romans found it necessary to establish set forms of actions under their laws, and all the modern civilized nations have followed their example.

The first distinction with respect to actions to be noticed is, that where satisfaction is demanded for injuries done to the plaintiff's person or property, they are said to be founded on *torts*, or wrongs ; and where a debt, or damages

If the pleadings are any of them frivolous or obviously improper, how may they be disposed of ?

What is an action ? What kind of actions are those said to be founded on *torts* ?

in lieu thereof, is claimed for the breach of some agreement, the action is said to be founded on *contract*.

Of the first kind are actions for trespass, as the unlawful seizure or destruction of one's property by force; a battery, or the striking and beating one's person; or the slander or defamation of one's character. In these actions, the remedy dies with the person. That is, if either party die before reparation has been exacted, his heirs, executors, or administrators cannot prosecute or be prosecuted, for it cannot be alleged that they received or committed any injury in their personal capacity; and the nature of the injury is not such that a right to a suit for compensation descends or passes down from the person who received it to his representatives.

Another peculiarity in actions of this character is, that where several persons have been engaged in the commission of the injury, the plaintiff may sue one or all of them at his pleasure; and where several are sued, if he is unable to prove that all participated, he may obtain a judgment against those, or as many of them, as he can prove to have been engaged in the commission of the wrong.

In actions founded upon contract, the right to sue descends to the representatives of the plaintiff; and the plaintiff, or his representatives, if he be dead, may prosecute the representatives of a deceased person, if they have assets of his to answer the demand.

They differ also from actions founded on torts in this—that where the contract was made jointly and not severally, it is necessary to bring a suit against all the persons who

What kind of actions are those founded on contracts? What effect has the death of the parties on actions of the first class? Why has it this effect? What peculiarity is there in this class of actions as to the number of persons who may be sued? How does the right to sue descend to heirs or representatives in actions founded upon contract? How do actions of the latter class differ from actions founded on torts, with respect to the persons who must be sued?

are living and had joined in it; for if a contract is sued upon as having been made by one person, who alone is sued, and it should turn out that the plaintiff could only prove a contract made by that person and another, it would not be considered such a contract as was alleged in the declaration, and, therefore, the plaintiff would fail.

It is always requisite that the plaintiff should prove such a cause of action as he alleges, and he cannot succeed on proof of any other. One reason for this rule is, that the defendant should be explicitly notified of what he is called upon to answer; and another is, that the suit should be a final termination of the matters in controversy between the parties, and, therefore, the record of it should show clearly what the precise nature of the controversy was, as otherwise, if a new controversy should arise, it could not be told, from that suit, whether it was for the same matters or not.

Some of the states have, by statute laws, made some modifications of this rule, for the purpose of enabling a plaintiff to proceed against one or more persons concerned in a joint promise or obligation, when there are others who cannot be found so that process can be served upon them. In these cases the suit is brought against all, but upon a return made by the sheriff that one or more of them cannot be found, the plaintiff is permitted to dismiss or continue his case as to those, and proceed against those who are found.

It frequently happens that one who has sustained an injury, or who complains of the breach of a contract, finds that there are several forms of actions, either of which will afford him an adequate remedy, and of which he may make choice at his election. In such cases, the actions

What rule is there as to the proof of such a cause of action as is alleged? Give the two principal reasons for this rule. What are the modifications of this rule made by statute laws?

are said to be concurrent; that is, he may adopt either of them.

It is also sometimes the case, that when one has sustained an injury for which he might recover damages in an action of the kind founded on tort, he may, if he chooses, waive his right to an action in this form, and sue as for the breach of a contract. For instance, if the personal goods of the plaintiff should have been forcibly seized and carried away by the defendant, the former might waive his right to have the identical goods restored to him, or to have damages for the force and violence used, and treat the defendant as a purchaser, who would be liable to pay him for them, as upon an implied contract to pay him the value of his property.

In some of the states, with a view to simplify the practice in the courts, the various forms of action established by the common law have been abolished, and new forms, fewer in number, have been substituted. In other states, with the same view and to annul the effect of some subtle distinctions as to the use of the various kinds of actions, the statutes provide that if a declaration or cause of action contains the substantial matters which would entitle the plaintiff to maintain any one action, it shall be sufficient, although the action brought should be entitled of the wrong name. That is, for example, if the plaintiff should entitle his suit an action of trespass, and the matters stated in his written complaint should show that the injury he complains of is not a trespass, but the non-payment of a debt, the suit will not be dismissed because of the misnomer, but it will stand and be tried as an action of debt.

When are actions said to be concurrent? May one waive his right to an action for tort and sue in an action founded on contract? Give an example. What changes have there been made in some of the states in the forms of actions?

CHAPTER XLVIII.

OF THE ACTION OF TRESPASS.

THE *action of trespass* is the appropriate remedy for any wrong done to a man's person or property, when the injury was accompanied by force, and when such injury was the direct and immediate result of the act complained of.

It may, therefore, be brought for an *assault*, which is an attempt or offer to beat another, without touching him, as if one, in a threatening manner, raises a weapon or his fist, but does not actually strike, or strikes at and misses the person aimed at. Or, for a *battery*, which is the unlawful beating of another. The least touch in a rude and angry manner is a battery, for the law cannot draw a line between different degrees of violence in such cases, and, therefore, totally prohibits it in any degree,—every man's person being sacred, and no other having the right to meddle with it in the slightest manner.

Every battery is said to include an assault, for there must necessarily have been an offer or attempt to commit it. Whenever, therefore, one has been unlawfully injured in his person by beating, the action brought is usually called an action of trespass for an assault and battery. The declaration alleges, in substance, that at a certain time and place, the defendant committed an assault and

For what injuries is an action of trespass the proper remedy? Give the definition of an assault. Of a battery. What degree of violence must there be to constitute a battery? When an action is brought for an unlawful injury to one's person, what is it usually called? What does the declaration allege?

battery upon the person of the plaintiff, by then and there unlawfully striking or beating him, to his damage ——— dollars.

The general issue, or the form of the plea used when the defendant wishes to deny all the facts charged against him in the declaration, in this action, as in all those founded on torts, is—Not guilty. It is written thus:—“The defendant comes and says he is not guilty in manner and form as the plaintiff has complained against him; and of this he puts himself upon the country.”

As in actions for injuries to one's person there can be no uniform criterion upon which to found any rule as to the amount of the damages to be recovered, the fixing of the amount is necessarily left much at the discretion of the court or jury by whom the cause is tried. They should, however, estimate as nearly as they can what sum would be an adequate compensation for the injuries received.

For injuries to the personal property of the plaintiff, as the forcible destruction of it, or the forcibly taking and carrying it away, the form of the declaration is, that at a certain time, &c., the defendant with force and arms took and carried away (or destroyed) certain goods, (naming them,) belonging to the plaintiff, of the value of ——— dollars, to the plaintiff's damage ——— dollars.

The damages which may be recovered are estimated by the full value of the goods taken or destroyed to the person losing them, and not merely their market value. There are many cases in which the owner would not be willing to dispose of his property at its mere market

What is the form of the plea called *the general issue* in actions founded on torts? How are the damages estimated for personal injuries? What is the form of a declaration for injuries to personal property? How are the damages for such injuries estimated? Why are they so estimated?

value; and when it is taken without his consent, the person taking it should in justice and reason be required to make full and adequate compensation.

This is one of the cases in which the plaintiff has more than one remedy, which he may pursue at his election. He may sue in this action of trespass to obtain damages for the taking of his goods; or he may bring an action of replevin to have the identical goods restored to him, in a manner to be hereafter mentioned; or he may waive his right of action for the tort or wrong committed, and sue the person who committed it for the price of the goods, as though he had purchased them.

Every unwarrantable entry on another's soil is called, in law, a trespass *by breaking and entering his close*. The action of trespass is, therefore, the common one for injuries of this character. One must have a right of property in the soil and actual possession of it, to be able to maintain an action for an injury to it by breaking the close; that is, passing over the boundaries of it—for the words used do not necessarily imply the breaking through an actual enclosure.

A man is not only answerable for his own personal trespass, but for that of his horses or cattle, and it is for injuries done by these species of animals that the greater number of suits of this kind are brought. They are sometimes, however, brought for the purpose of trying disputed questions relative to the title of the parties.

What choice of remedies has the plaintiff in such cases? What is an unlawful entry on another's soil called? What more besides a right to the property must a person have to maintain an action for breaking the close? What do the words *breaking the close* imply? For what trespasses is a man answerable besides his own personal trespass?

CHAPTER XLIX.

OF THE ACTION OF TROVER.

THE *action of trover* was originally invented for the recovery of damages against such person as had found another's goods, and converted them to his own use instead of restoring them. Gradually, however, this action was found so convenient, that it was permitted to be brought against any one who had, by any means, obtained possession of the personal goods of another and sold or used them without the consent of the owner. It is still customary to allege in the cause of action that the plaintiff casually lost the goods, and that the defendant found and converted them to his own use; but this averment of the losing and finding is merely a fiction, and need not be proved.

But the *conversion* must be fully proved, as that is called the *gist* of the action, or the matter in which the injury lies. It is immaterial in what manner the goods came to the defendant's hands, whether lawfully or otherwise; if he has no right to them he ought not to convert them to his own use; and if he refuses to deliver them to the proper owner, when requested to do so, the law presumes such refusal sufficient evidence of a conversion.

Therefore, when the defendant came lawfully into the possession of the goods, as if he really found them, or they were delivered to him by some one having them in possession, to keep for any purpose, the plaintiff must

For what purpose was action of trover originally invented? In what cases is it now used? What fiction is it customary to allege which need not be proved? What is the gist of this action?

allege in his declaration, and prove at the trial, if it is denied, that before the suit was brought he requested the defendant to deliver them. Such a demand would be necessary before he would have a right to commence a suit, because, if the defendant acquired the possession of the goods lawfully, he would not be in fault until he had rendered his possession unlawful by some improper act, such as a refusal to deliver them to the right owner when requested to do so.

But if the defendant obtained the possession of the goods unlawfully, or tortiously as it is termed—as if he carried them away from the owner's house without any permission or consent—such a *tortious* or wrongful taking is deemed a conversion, and no demand to have them returned need be alleged or proved.

The person who brings an action of trover must allege in his declaration that the goods are his property; but he need not prove that he is the proper or full owner. A bailee, or one who has hired or borrowed the goods from the proper owner, or one who has the mere naked possession of them, as if he had previously found them himself, has such a qualified right of property in them that he may maintain this action against a wrongdoer, or one who without any right at all takes them from him.

In this action, the plaintiff does not obtain the possession of the goods again, but their value in damages as a compensation for their conversion. The rule for estimating the damages is the same as in the action of tres-

If the goods came to the defendant's possession lawfully, what must the plaintiff do before bringing a suit? Why must he make a demand? When is no demand necessary before bringing suit? Why is it not necessary in that case? What right of property must the plaintiff allege and prove in this action? What does the plaintiff recover in this action? By what rule is the damages estimated? If the defendant has paid a judgment for the value of the goods in this action, in what action can he be sued again?

pass. When the defendant has made compensation, by the payment of a judgment for their value, he cannot be sued again for them in any kind of action; though, as it has been before remarked, the plaintiff might, in the first instance, have waived his right to this form of action and sued the defendant as a purchaser of them.

CHAPTER L.

OF THE ACTION OF REPLEVIN.

THE *action of replevin* is the only common-law action now in use in which the plaintiff obtains the restitution of personal goods when wrongfully taken from him, with damages for the loss sustained by their unjust detention.

It was originally used chiefly when a landlord wrongfully and without sufficient cause *distrained* or seized upon the goods of his tenant for rent; but it is now in use in all cases where one person wrongfully takes or detains the goods of another, and the owner desires to have the identical goods restored to him, rather than to obtain a compensation in money for their value.

The requisite steps in proceeding in this action are regulated by the statute laws in the several states. Usually, the plaintiff must make an *affidavit*—which is an oath in writing—that the goods sought to be replevied are his property, and that they are unjustly and unlaw-

In what actions can restitution of the identical goods be obtained, when such goods are unlawfully taken from the owner? In what cases was the action of replevin originally used? In what cases is it now used? By what laws are the necessary steps to institute this action regulated?

fully detained by the defendant. Upon such an affidavit being made and filed, a writ is issued by the magistrate, or by the clerk of the court in which the action is to be brought, commanding the sheriff or other proper officer to whom it is directed, to take the goods into his custody and safely keep them until the plaintiff shall satisfy him, by giving good security, that he will prosecute his suit to effect, and return the goods to the defendant if such return shall be awarded on the final hearing of the cause.

By virtue of this writ, the officer takes the goods from the defendant and immediately delivers them to the plaintiff, upon the delivery of a bond to him by the latter, with security, and conditioned as above mentioned. The suit then goes on as in other cases. The plaintiff must file his declaration or cause of action, and establish his right to the goods upon the trial. If he fails in this, he must return the goods to the defendant according to the condition of his bond, or he and his securities will be liable to an action on the bond for the breach of its conditions.

In this action, as in trespass or trover, the plaintiff need not prove that he is the absolute owner of the goods. It is sufficient if he shows a right to them as a bailee, or one having some qualified right. But one having no right at all cannot maintain this suit against any person; for if neither the plaintiff or defendant could show any right but the mere being in possession, here the defendant is the one having the possession, and the plaintiff cannot take the goods from him without showing a better right. Consequently, the defendant may defeat the action if he can plead and prove that the goods are not the property

What must the plaintiff do to obtain a writ of replevin? What are the commands of this writ? What does the officer do by virtue of the writ? How does the suit then go on? What right of property must the plaintiff show? Can one having no right to the property maintain this action in any case? Why not? How can the defendant defeat the suit by pleading that the property belongs to other persons?

of the plaintiff, but the property of any other person who has the right to the possession of them, whether that person be the defendant himself or a stranger having no connection with either the plaintiff or defendant.

The same rule prevails with regard to the original taking of the defendant as in trover; that is, if the goods came into the possession of the defendant lawfully, but, after having obtained them lawfully, he detains them unlawfully against the will of the plaintiff, it is necessary to prove that a demand was made for them before the suit was brought, or that some act was done by the defendant converting the lawful taking into an unlawful detention.

There is this peculiarity in the action of replevin—that the defendant may justify, or, as it is termed, *avow* the taking or detention, and assert that he had good right and lawful authority so to do, setting out the particulars as in an ordinary plea of confession and avoidance. Thus, for instance, if a sheriff having an execution against A levies on certain property, and B, claiming the property as his own, brings an action of replevin against the sheriff, the latter may avow the taking by virtue of the execution, and allege that the goods are the property of A and subject to be so levied upon. Upon such an *avowry* being made, both parties are regarded as plaintiffs, and the original plaintiff may plead to the avowry in the same manner as the defendant may plead to a declaration in other suits.

In this action, the original plaintiff cannot dismiss his suit or suffer a nonsuit without losing his case, for the condition of his bond is that he will prosecute his suit to

When must the plaintiff demand the goods of the defendant before bringing this action? What peculiarity is there in this action as to an avowry? Give an example. How are the parties regarded when an avowry is made? Can the original plaintiff in this action dismiss his suit? Why not?

effect, that is, to the obtaining a final judgment on the trial in his favour; and, therefore, a failure to obtain such judgment, from any cause—whether from a failure to take the necessary steps to bring on the trial, a defect in the proper pleadings, or from inability to make the necessary proof—entitles the defendant to have a return of the property.

When from any such cause the plaintiff fails in his action and the defendant succeeds, the latter is entitled to have a writ issued commanding the sheriff or other proper officer to take the property again into his custody and return it to the defendant. If the officer cannot find the property, and it is not returned by the plaintiff, the condition of the bond is violated, and the defendant may resort to a suit upon it for compensation.

If, upon a trial, the plaintiff is successful, he usually obtains a judgment for nominal damages, as one cent and the costs of the suit; for as he has already obtained the possession of the property, his principal object is attained if his right to it is secured by a simple judgment in his favour. If, however, the property was taken by the defendant under such circumstances as to occasion special damage to the plaintiff, such damage may be alleged and compensation recovered.

To what is the defendant entitled if the plaintiff fails in obtaining a judgment? What is the consequence if the property is not returned to him? What is the nature of the judgment rendered for the plaintiff if he succeeds?

CHAPTER LI.

OF THE ACTION OF EJECTMENT.

THE *action of ejectment* is the one in common use when it is desired to try the title to lands and tenements. This action is usually regarded as one of objectionable intricacy, because of the fiction employed for the purpose of introducing the nominal parties; but by a little attention it will be perceived that it is in reality very simple.

The title to lands may be tried in an action of trespass for breaking the close of the plaintiff, because the plaintiff must have a right to the possession of the land on which the alleged trespass was committed to enable him to maintain that action; and if his title is denied and not proved, he could obtain no remedy for the trespass. But if successful in that action, he obtains damages for the trespass only. He does not obtain restitution of the land if the trespasser continues to hold it. It is, therefore, an imperfect remedy when the plaintiff desires to obtain the *possession* of lands or tenements wrongfully withheld from him by another person.

The action of ejectment is a species of the action of trespass, and it is frequently called *trespass in ejectment*. It was originally contrived as a remedy for one who had a lease for years and was turned out, or *ousted*, as it was technically called, from his leasehold by some stranger. In process of time, it was found so well adapted for the

What is the action of ejectment used for? Why is it preferable for that purpose to the action of trespass? For what case was it originally contrived as a remedy?

purpose of ascertaining the rights of contending parties for the possession of lands, that it was generally used in all cases where one party desired to turn out another on the ground that he had a better title.

When it first began to be used for this purpose, the person who supposed he had a legal right to the possession of land wrongfully withheld from him made an actual entry on the premises, and there sealed and delivered a lease of them to some third person. The latter person being thus put in possession, he remained upon the premises until he who was previously in possession came and *ejected*, or turned him out.

For this injury, the *lessee* brought an action against the person who ejected him, to recover back his possession. Of course, in such an action the lessee had to rely upon the right of his lessor to enter upon and give him possession of the premises; and thus the conflicting claims of the lessor and the ejector would be investigated and settled.

But as the person who claimed the previous possession of the land, and who was therefore termed *the tenant in possession*, might not always be present to turn out the lessee when the lease was granted to him, another person was sometimes employed to do so, and this person was then called the *casual ejector*, because it might be supposed that he was accidentally or fortuitously upon the premises. In such cases, the suit was brought by the lessee against the casual ejector, he being the one who committed the trespass; but as the suit was brought to recover the land, and not merely to obtain damages for

When it first began to be used for trying titles, what steps did the plaintiff take to obtain a pretext to commence suit? For what injury was the suit brought? What was done when the previous possessor was not present to turn the lessee out? What was the person then employed to turn the lessee out called?

the injury committed in turning the lessee out, the courts would not permit the tenant in possession to be turned out without notice was given to him of the pendency of the action, in order that he might defend the possession if he chose to do so. When, therefore, an action was brought against the casual ejector, it was the duty of the plaintiff to see that notice was given to the tenant in possession, and the latter was permitted to substitute himself as defendant in the place of the casual ejector.

The plaintiff then had four things to prove upon the trial; namely, *the title* or claim of his lessor, which brought the question of the right of the parties to the premises before the court; *the lease*, under which the plaintiff claimed a right to enjoy the possession of the premises; his actual *entry* into possession; and his *ouster* or *ejectment* by the defendant.

This was the regular method of bringing an action of ejectment, and in it the title of the lessor came collaterally and incidentally in question, as one of the necessary links in the chain of evidence required to show the injury done to the lessee by the ejector. But as this was in reality the main question—the other points, namely, the lease, entry, and ouster, being merely devices to get the question of title fairly before the court—it occurred to the Lord Chief Justice Rolle, who was upon the bench during the reign of Cromwell, that the trouble and formality of making an actual entry and lease of the land might be dispensed with. With this view he invented the present action of ejectment, which was adopted, and has been in use ever since. It differs from

When suit was brought against the casual ejector, what notice was the plaintiff required to give? What four things was the plaintiff required to prove on the trial? In what way did the title of the lessor come in question in such a trial? Who invented the present action of ejectment?

the old action for the same purpose only in requiring the real defendant to admit, before going into trial, for the purpose of resting his case on the question of title only, that a lease, entry, and ouster had occurred, though in fact they had not, but are considered merely legal fictions.

No actual lease or entry is made, nor is there any actual ouster by the defendant, but they are merely ideal, as are also the persons of the lessee and the ejector. A declaration is drawn up stating that a lease for a term of years was made by the person who wishes to institute the suit, to a fictitious person, who is the lessee and the nominal plaintiff—as by James Rodgers to John Doe. It is then alleged that Doe, the lessee, entered upon the premises and became possessed of them; whereupon, another fictitious person, who represents and is still called the casual ejector, ejected him, for which ejectment he brings this action.

There is appended to this declaration a notice in the name of the fictitious casual ejector—which is usually Richard Roe—directed to the person who is actually in possession of the land, informing him of the action brought by John Doe, and the object of it, and advising him that he, the said Roe, has no title at all to the premises and will make no defence. In the notice, the person in possession is also advised to appear in court and defend his own title, as, otherwise, the casual ejector will suffer judgment to go by default, and thereby the actual possessor will be turned out.

A copy of the declaration, with the notice appended to it, is served on the tenant actually in possession of the

In what respects does it differ from the old action? What statements does the declaration contain? What notice is there appended to the declaration? Upon whom is a copy of the declaration and notice served, and for what purpose?

premises, and serves in place of the summons used in other actions. If the person actually in possession be merely a yearly tenant, or some one holding under another more interested than himself in opposing the claim of the person who caused the suit to be brought, it is his duty to give immediate notice thereof to his landlord or such other person.

Upon the declaration and notice being thus served in due time, if the defendant in possession or some other person claiming title to the premises does not appear at the next term of the court in which the declaration is entitled, and claim to be admitted as defendant, it will be supposed that he has no title at all, and judgment will be rendered against the casual ejector.

If, however, the person actually in possession of the land, or his landlord, applies to be made a defendant, it is allowed him on this condition—namely, that he will enter into an agreement to confess, at the time of the trial, three of the four requisites for the maintenance of the plaintiff's action; that is, the lease of Rodgers to John Doe; the entry of Doe, the nominal plaintiff; and his ouster or ejectment by the actual defendant, instead of by Richard Roe, the fictitious casual ejector. The reason of these admissions being required is that—those three requisites being wholly fictitious—if the defendant should require the plaintiff to prove them, the latter must, of course, fail in his action for want of evidence; but by such stipulated confession of the lease, entry, and ouster, the trial will now be upon the merits of the title only.

What should the person upon whom the declaration and notice are served do if he is merely a yearly tenant? If no person appears to answer the suit after notice thus served, what is the consequence? If a person applies to be made a defendant, what admissions is he required to make? What is the reason for requiring these admissions? How must these admissions be signed?

This agreement having been reduced to writing, signed by the actual plaintiff and defendant, or by their counsel, and entered upon the record of the suit, the defendant pleads that he is *not guilty* of the trespass in ejectment mentioned in the declaration, and the cause is set down for trial under the name of James Rodgers (the actual plaintiff) on the *demise* (that is, on the lease) of John Doe, against the person who is admitted as the actual defendant.

These proceedings have an air of intricacy, owing to the fictions employed; but when once understood—which they may easily be—they present no practical difficulties; and as they result in making the cause turn on the single question whether the person causing the suit to be brought has a better title to the premises in controversy than the person previously in possession, it is very seldom that they present any occasion or pretext for further pleadings.

If the lessor does not make out his title in a satisfactory manner, the defendant succeeds of course. When the plaintiff does succeed, he obtains a judgment that he recover his term in the premises—that is, his right to have possession of them during the period specified in the supposed lease. To enforce this judgment, a writ issues to the sheriff, commanding him to put the plaintiff in possession, which that officer does by going upon the land and turning the previous possessor out, by force if necessary. When no real defendant appears, and judgment is consequently rendered against the casual ejector, the plaintiff is entitled to the writ to put him in posses-

What does the defendant plead when the agreement is placed upon the record? In what names does the cause then stand for trial? When the plaintiff succeeds upon the trial, what is the nature of the judgment rendered for him? How is this judgment enforced? When no actual defendant appears and judgment is rendered against the casual ejector, what writ is the plaintiff entitled to?

sion, in the same manner as when he obtains a judgment against an actual defendant.

The damages recovered in the action of ejectment by the plaintiff when successful, are merely nominal, and are not intended as a compensation for the loss sustained by being deprived of the premises during the time they were occupied by the defendant. Where the possession has been long detained from the right owner, an action may be brought, after it has been recovered, for the *mesne profits*, or profits received by the defendant during the time the premises were wrongfully held by him.

In an action for these mesne profits, the previous judgment in ejectment is, in itself, sufficient evidence to entitle the plaintiff to recover of the defendant all the rents and profits which have accrued since the date of the demise or lease stated in the declaration in the suit of ejectment. The defendant cannot, indeed, dispute the right of the plaintiff to recover from him the profits received during the period commencing with the date of said supposed lease, and ending at the time the plaintiff recovered possession of the premises, as that right was settled and determined in the previous suit. But if the plaintiff sues for any profits antecedent to the date of the lease, as stated in the former declaration, the defendant may make a new defence, for the judgment in the ejectment suit only establishes the right of the plaintiff from the time the supposed lease was made.

What damages does the plaintiff recover in this action? How can he recover the rents or profits of the land received by the defendant while he was wrongfully in possession? In an action for the mesne profits, what use can the plaintiff make of the previous judgment in the ejectment suit? For what period does that judgment settle the right of the plaintiff to have the rents and profits?

CHAPTER LII.

OF THE ACTION OF TRESPASS ON THE CASE.

ONE of the forms of action in most common use is that of *trespass on the case*. The methods of injuring and deceiving others are so various, that it would be difficult, if not impossible, to devise forms under which suitable remedies could be given in actions adapted only to particular classes of injuries; and, therefore, this action is given for the redress of wrongs and injuries done without force, and not particularly provided for otherwise. It is called an action on the case, because the particular circumstances or facts on which the plaintiff relied were formerly narrated in the writ issued to notify the defendant, as well as in the declaration.

By the common law, the action of trespass was only sustainable when the injury was the immediate result of an act done by the defendant, and it did not reach cases where the injury was consequential. When an act is done which in itself is an immediate injury to another's person or property, the remedy is usually by an action of trespass; but when there is no act done, but there is some culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, no action of trespass would lie; and the proper remedy is an action on the case for the damages consequent on such omission or such act.

For what purpose is this action given? Why is it called an action on the case? What distinction was there made by the common law as to the cases in which trespass or trespass on the case was the proper remedy?

Thus, if a man should build a dam on his neighbour's land, he would be liable to an action of trespass for the direct injury of invading the premises; but it is lawful for him to build a dam upon his own land, and if his neighbour's property should be injured by the consequential overflow of the water, the remedy would be an action on the case.

It is sometimes difficult to decide whether an injury is in its nature direct or consequential; and in determining whether suits were properly brought as actions of trespass or trespass on the case, the courts were sometimes compelled to make very subtle distinctions. To avoid the necessity for this, it has been provided by the statute laws in several of the states, that mistakes in giving the right name to the action—as entitling it an action of trespass, when, according to the facts stated in the declaration, it should have been called an action on the case, or an action on the case when it should have been styled trespass—shall not prevent the plaintiff from recovering, but that the suit shall proceed as if it had been properly entitled.

This action may be resorted to in all cases where a man has suffered loss or damage from the tort or wrongful act of another, and no other specific remedy is provided, whether such damage be done to the person or property of the plaintiff. It is, consequently, the proper action when one erects or maintains something which becomes a nuisance to another—as by the depositing of filth, or the making an obstruction to the free use of his property, so that he is injured in his business, health, or comfort.

A very numerous class of cases which have their appropriate remedy in this form of action, is composed of those

Give examples in which the action of trespass and trespass on the case would be appropriate. What provision has there been made by statute laws in some of the states, on this subject? In what cases may this action be resorted to?

arising from libels and slanders. In this country, the utmost freedom of the press is secured by law, but still the owners and publishers of newspapers and books are responsible for false and slanderous charges against others, in the same manner as they would be for like charges made orally or by words spoken; and they are so liable though the libel was published by their servants or workmen without their knowledge. Like all other persons, they are required to have such a reasonable care and supervision over their business as to prevent the insertion of obnoxious matter, unless it is done under circumstances which they could not reasonably be supposed able to control.

Words—either printed, written, or spoken—which charge a man with having committed a criminal offence, or which are calculated to render him odious, or to injure him in his particular office, trade, or business, are *slanderous*, or actionable in themselves, and no particular damage need be alleged or proved. And any injurious words spoken of another may become actionable if they actually do occasion some special or particular damage to the person of whom they were published—as by the prevention of his preferment, marriage, or his acquisition of an estate, &c. But in the latter case, as some special damage is necessary to make the words a cause of action, such damage must be averred in the declaration and proved upon the trial.

Thus, if a man says of another that he has a loathsome disease which would exclude him from society, or is guilty of dishonest practices in the management of his office, trade, or business, or that he has been guilty of theft,

To what extent are publishers of books and newspapers responsible for false charges against others? What are the kind of words that are actionable? What distinction is there as to words that are in themselves actionable and words that are not? What must there be alleged and proved when the words are not in themselves actionable?

robbery, murder, or some other crime which would subject him to punishment under the laws, the simple allegation that the defendant falsely spoke or otherwise published such a charge, makes a sufficient cause of action, for the law considers such a charge, falsely made, necessarily injurious. But if one says of another that he is a rogue, or person of general bad character, as the words do not, of themselves, import such defamation as will be necessarily injurious, no action will lie, unless it can be shown that some special injury was thereby occasioned.

This action is not confined to torts, but is frequently founded on contract. It may be brought when one is injured by the neglect or refusal of another to perform an agreement, or to perform it in a proper manner; as if a tailor undertakes to make a suit of clothes, or a carpenter to build a house, and fails to do so, or wastes or spoils the materials intrusted to him for that purpose. It is also used in cases of deceits and frauds of all kinds whereby injury results to the plaintiff.

CHAPTER LIII.

OF THE ACTION OF ASSUMPSIT.

AN *action of assumpsit* is a species of action of trespass on the case, which the law gives the party injured by the breach or non-performance of a contract legally entered into. It is so named because it is founded on a promise,

Give an example of words actionable in themselves, and words that are only actionable if they occasion some special injury. In what other cases may this action be brought?

What is the nature of the action of assumpsit? Why is it so named?

by which a man takes upon himself or *assumes* to perform some act, and fails to do so.

When a promise is made to do a thing on a particular day, the party is bound to do it without any request or demand; and though it is usual to allege a request in the declaration, it is not essential that it should be proved. The time for the performance of the promise being elapsed, and the promise remaining unperformed, no other evidence of a breach of the agreement is required.

So, when the promise is simply to pay money or to do an act, and no time is specified, the law construes it to be a promise to pay immediately, or to do the act as soon as it can reasonably be done, and no demand need be made. But if the act is not to be done until a request or demand is made, such request or demand is necessary before a cause of action can accrue; and it is, therefore, necessary that a specific request, made at the time and place specified in the contract, if any be so specified, should be alleged in the declaration and proved at the trial.

The action of assumpsit is very similar, both in form and substance, to the action of debt; and in many cases either of these actions may be brought, at the option of the plaintiff, but assumpsit will lie in some cases where the action of debt will not. Thus, the action of debt is applicable only when there is a promise to pay money, but assumpsit may be brought when the promise is to pay either money or in goods. It is true the goods are not recovered, but damages for the breach of the agreement to pay or deliver them.

In the case of promissory notes, due-bills, bills of exchange, or other instruments in writing, not under seal,

What is the rule as to the necessity of a demand being made before suit, when the promise is to do an act on a particular day, or without any time being specified? When must a demand be made? In what cases may this action be brought in which an action of debt could not?

for the payment of money, either an action of assumpsit or an action of debt may be brought; but if, as is not unfrequently the case, a note be made for the payment or delivery of a certain quantity of wood, or of any article not money, the action of assumpsit may be brought, but the action of debt could not be sustained.

It is not necessary in this action, when the claim is for the value of goods sold or work performed, or for money paid for the defendant, or for money had and received for the use of the defendant, or for money lent to the defendant, that the plaintiff should set out or state in his declaration the special circumstances under which he claims that the defendant became liable to him; but he may state the promise generally, as that the defendant promised to pay him so much money for goods sold and delivered, and make out his case at the trial.

But if the plaintiff has any doubt whether the circumstances when detailed would make out a legal promise, or a breach of a promise, he may set them out specially; and then, if his statement should be demurred to, he would obtain the opinion of the court upon the question of law before going into the proof of the facts.

The plaintiff may, if he chooses—and it is often done—set out the special circumstances of the case in one or more counts of his declaration, and declare generally in other counts.¹ Counts that contain only this general statement of the breach of a promise are called *common counts*, and those containing a detailed statement of the facts con-

On what kind of written instruments may this action be brought? In what cases may the plaintiff state the promise generally, without setting out the special circumstances? For what purpose does he sometimes set them out specially? What are counts that contain only a general statement of the breach of a promise called? What are those containing a detailed statement of the facts called? May the plaintiff declare generally and specially on the same cause of action in his declaration?

stituting the plaintiff's cause of action are called *special counts*.

The general issue in this form of action, or the plea which is used when the defendant wishes to deny the plaintiff's cause of action, and to require proof of all the material facts alleged by him, is called *non-assumpsit*. It simply denies that the defendant assumed or promised in the manner and form alleged by the plaintiff.

The following is the usual form of a declaration in assumpsit containing the common counts, with the plea of the general issue, and a joinder thereto. If the counts are special, the facts are set out, and then the promise or undertaking is stated in the same manner :—

“A. B., plaintiff, complains of C. D., defendant, for that the said defendant, on the —— day of ——, at the county of ——, was indebted to the plaintiff one thousand dollars, for goods sold and delivered to him at his request; and in the like sum for so much money had and received for the use of the plaintiff at the defendant's request; and in the like sum for so much money loaned by the plaintiff to the defendant at his request: [Any number of counts applicable to this form of action may thus be added.] And being so indebted, the defendant promised the plaintiff to pay him said several sums upon request; yet, though often requested, he has failed and refused so to do, to the plaintiff's damage one thousand dollars, wherefore he sues.”

“And C. D., the defendant, comes and says he did not assume and promise, in manner and form as the plaintiff has alleged; and of this he puts himself upon the country.”

“And the plaintiff doth the like.”

What is the general issue in this form of action called? Give the substance of the contents of a declaration on the common counts in this action, with a plea of the general issue and a joinder.

CHAPTER LIV.

OF THE ACTIONS OF DEBT AND COVENANT.

THE *action of debt* is given for the recovery of any sum of money due by agreement, when the amount is fixed and specific, or may be ascertained by simple computation, and does not require any subsequent valuation to settle it. It may be brought when one fails to pay any such debt, as, for instance, when the failure should be to pay a note, bill of exchange, a bond, or an agreement to pay a certain sum for any goods and chattels, or so much for each of a certain number of things or parts of things.

As has been before explained, a debt may often be claimed although there has been no express contract between the parties, because the law will imply the necessary agreement. Whatever one is legally liable to pay becomes instantly a debt. The legal right or duty stands in place of an agreement; for it would be useless to require a man to agree to do that which the law compels him to do. Thus, if one man receives money belonging to another, it is his duty to pay it over to the proper owner. If he does not, he may be sued in this form of action; and he will not be permitted to say he did not agree to do so.

In the action of *assumpsit*, the plaintiff seeks to recover damages in gross for the breach of a contract; but in the action of debt he asks a judgment for the debt and also

In what cases may the action of debt be brought? In what cases may a debt be claimed where there is no express agreement to pay? And why? In what does this action differ from the action of *assumpsit*?

damages for its detention. Therefore, this action will not lie for unliquidated or uncertain demands, but is confined to demands certain in amount, or susceptible of arithmetical computation. The damages allowed for the detention of the debt are usually measured by the amount of the interest which has accrued since the debt became due. In other respects, this action is very similar to the action of assumpsit, and there are very few cases where that action might not be brought concurrently with this.

The following is an example of the form of a declaration in an action of debt, with a special plea in bar, a replication, a rejoinder, and a surrejoinder, similar to those mentioned in the chapter on special pleading:—

“A. B., plaintiff, complains of C. D., defendant, in an action of debt: For that whereas the said defendant, on the —— day of ——, at the county of ——, bought of the plaintiff five hundred barrels of flour, at the price of five dollars per barrel, by means whereof he became indebted to the plaintiff twenty-five hundred dollars, which he agreed to pay upon request; yet, though often requested, he has not paid said sum, or any part thereof, to the plaintiff's damage two hundred dollars, wherefore he sues.”

“And C. D., the defendant, comes and for plea says, the plaintiff ought not to maintain this action, because at the time of the making the contract in the declaration mentioned, the defendant was a minor under twenty-one years of age; and this he is ready to verify.”

“And the plaintiff, for replication to the plea of the defendant herein, says he ought not to be barred by any thing in the said plea alleged, because afterward, to wit, on the —— day of ——, the said defendant then being of the full age of twenty-one years, ratified and affirmed

How are the damages in this action computed? Give an example of a declaration and other pleadings in this action.

his said contract; and this the plaintiff is ready to verify."

"And the defendant, for rejoinder to the replication of the plaintiff herein, says the said ratification and affirmation therein mentioned was procured from him by the plaintiff by fraud and deceit; and this he is ready to verify."

"And the plaintiff, for surrejoinder to the rejoinder of the defendant, says said affirmation was not obtained by fraud; and of this he puts himself upon the country."

"And the defendant doth the like."

It will be observed that in the action of assumpsit the plaintiff lays his damages, or the sum he demands, high enough to cover all he can hope to obtain. If it is a note that is sued on, for instance, the principal sum and the interest both become damages; and it is quite immaterial what sum the plaintiff claims as damages, so that it is large enough to cover all that can be recovered, both of principal and interest. But in the action of debt the plaintiff claims the precise sum due as his debt, and an amount as damages sufficient to cover the interest that may have accrued up to the time when he expects to obtain a judgment.

A *covenant* is an agreement by two or more persons, in writing under seal, whereby either or one of the parties undertakes with the other that something is already done or shall be done afterward. As if a man covenants with another that he has a quantity of flour, or other goods, at a particular place, with the purpose of selling them; or that he has a good title to a tract of land which he is about to convey; or that he will be at a certain place at a specified time; or that he will not exercise a trade or profession at a particular place. If he should violate any

How does a declaration in this action differ from a declaration in assumpsit in stating the damages? What is a covenant? Give some examples.

such agreement, it would be technically called a *breach of covenant*, for which he would be liable to an action.

When it is desired to have the specific thing done which the delinquent party agreed to do, it is necessary to resort to proceedings in chancery, as in the action of covenant at law only damages are recovered for the injury sustained by the breach of the agreement.

Hence the action of covenant is seldom brought except where an action of debt would also lie, and in such cases it differs but little from that action except in name. In the case of bonds, for instance, if there is a penalty, an action of debt may be brought for the penalty; but the judgment, though for the whole amount of the penalty, would be satisfied by payment of the damages actually sustained. If the action of covenant was brought, the judgment would be for the damages only.

CHAPTER LV.

OF THE PROCESS FOR BRINGING PARTIES INTO COURT.

WHEN a person has received an injury, and desires to institute an action for the purpose of obtaining satisfaction, he must first take the requisite means to bring the offending party before some court or magistrate having cognizance of such infractions of the law as that of which he complains.

What is recovered in an action of covenant? How does an action of covenant differ from an action of debt?

What is the first thing to be done in instituting an action?

To this end, he must apply to such court or magistrate for a writ, requiring the person of whom he complains to appear and answer the charge made against him.

This writ is in the form of a mandatory letter, issuing, in this country, in the name of the United States or of a state, and directed to the proper marshal, sheriff, or constable, as the case may be. Of such writs there are two principal kinds used in civil cases.

One, called a *summons*, requires the officer to whom it is directed to *summon* or cite the person named in it to appear at a certain time before the court from which it issued, and answer the charge there preferred against him. The object of this writ is to give the defendant notice of the charge thus preferred; for it is one of the first principles of the law, that no judgment should be rendered against any person unless due notice shall have first been given him of the pendency of the suit.

The second species of writ is called a *capias*, or *capias ad respondendum*, which commands the officer to whom it is directed to *take the body* of the person against whom the complaint is made, and keep him safely, so that he may have him in court on the day named, to *answer* the complaint made against him. The object of this writ is not merely to give notice to the defendant of the pendency of the suit, but also to enforce his personal attendance, so that he may be coerced to perform the judgment of the court by imprisonment if necessary.

By the terms of this writ, the officer is commanded not only to take or arrest, but also to keep the body of the defendant. The latter may, however, give security that he

Of whom is a writ to be procured? What is the form of the writ? How many kinds are there in civil cases? What does a *summons* require? What is the object of this writ? What is the other species of writ called? What does it direct the officer to do? What is the object of it?

will appear and answer according to the terms of the *capias*, and he will thereupon be entitled to be discharged from custody. This is called entering or giving *special bail*, and in that case the person who becomes surety will be liable for the debt or demand recovered by the plaintiff, if the defendant fails personally to appear.

In those states of the Union which have now abolished imprisonment for debt, this kind of writ has become almost obsolete, except in certain peculiar cases. In those states it may be used when a defendant is attempting to leave the state, taking with him property from which the debt claimed by the plaintiff might be made ; and, perhaps, in some other instances where a debtor is attempting to do acts which the law deems fraudulent.

If the defendant does not reside in the state where the plaintiff is entitled to bring a suit, or if he conceals himself so that he cannot be found, as in either of these cases the ordinary process of the courts could not be served upon him, the plaintiff may procure a writ called a *writ of attachment*, directing the officer to attach the *property* of the defendant, if any can be found in the state, in order that it may be subjected to the payment of the plaintiff's debt or damages, if any be found due.

In such cases, notice of the pendency of the suit may be given the defendant by publication, as by posting up notices in conspicuous places or having them inserted in a newspaper ; as, otherwise, there would be no possibility of instituting a suit against him. The manner in which this should be done is prescribed by the statutes. The policy of the law requires that actual notice of the pend-

What is meant by entering special bail ? For what is the security liable ? What statute laws are there in some states which have an effect upon the use of this writ ? How can a person who resides out of the state, or who conceals himself, be sued ? How is notice given of the pendency of the suit in such cases ?

ency of a suit should be given in all cases when it can be done; but if it cannot, then, as the plaintiff ought not to be deprived of his remedy by the wilful act of the defendant in placing himself out of the reach of a notice by summons or *capias*, it is considered sufficient if such reasonable opportunity be given him to obtain notice as it is in the power of the state or the plaintiff to furnish.

The first process usually issued in criminal cases is called a *warrant*. This writ is granted by the proper court or magistrate, on complaint made—usually under oath—of some criminal offence committed by a person therein named. It requires the sheriff, or other officer, to arrest the person-named as the offender, and bring him before the court, if the warrant was issued by a court; or, if issued by a magistrate, to bring such person before the same magistrate or some other magistrate of the proper county.

CHAPTER LVI.

OF THE MODE OF CALLING AND DISPOSING OF CAUSES.

ACTIONS may be commenced at any time during the vacations of the courts, by procuring a writ to be issued by the clerk, such as is described in the preceding chapter. Such writs generally require the defendant to appear and answer the complaint of the plaintiff on the first day of the next ensuing term.

What is the policy of the law as to notice? What is the first process used in criminal cases called? By whom is it granted? What does it require?

At what times may actions be commenced? When does the writ issued usually require the defendant to appear?

Whenever such a writ is issued, the clerk enters the names of the parties in a book called the *docket*, or *appearance docket*. This book, when the court meets at the next term, is handed to the judge, who usually commences the business of the court by calling up the causes for trial in the order in which they are entered.

When a cause is called, if the defendant does not appear in court, either in person or by attorney, he is said to make *default*, which is considered equivalent to an admission by him that the plaintiff's cause of action is well founded, or that he cannot answer it; and a judgment will be rendered accordingly. Such a judgment is called a *judgment by default*; and before rendering it the court should be satisfied that the process issued had been duly served in proper time on the defendant, in order that it may appear he had notice of the suit thus instituted against him.

If the plaintiff does not appear when the cause is called, the defendant, if he be present, may have the suit dismissed. If neither party appears, the court may, at its discretion, order the cause to be stricken from the docket, and thus dismiss it, or continue it to another term, or pass it over informally, in order to give further time for the appearance of the parties.

It is usual and necessary, before proceeding against a party in his absence, to have such party called; to which end the sheriff calls the party by his name three times in open court. If he then fails to answer, he is considered absent and in default.

How is the docket made? What is a default? What is it considered equivalent to? What is the consequence of a default? What should appear to show that the defendant had due notice? If the plaintiff does not appear, what may the defendant do? If neither party appears, what does the court do? What is done before proceeding against a party in his absence?

If it is the defendant who makes default, when the demand sued for is a debt of a specific sum, or one which can be ascertained by simple computation, the court will proceed to render a judgment for the proper amount. But if the demand is one for damages which are uncertain in amount, or require an investigation to ascertain the amount, the court renders a preliminary judgment that the defendant has been guilty of the trespass or injury complained of by the plaintiff; but, inasmuch as the exact amount of damages thereby sustained by the plaintiff is not known, a jury is called to estimate them, and the court afterward renders a final judgment for the amount of the damages assessed by the jury.

Such a jury is called a *jury of inquiry* or *inquest*. It takes no cognizance of the question whether the wrong complained of was actually committed or not, that question being settled in the affirmative by the preliminary judgment. It simply proceeds to ascertain what damages the plaintiff has thereby suffered.

If both parties appear when the cause is called, they are usually asked by the judge if the issues are made up; that is, if the defendant has filed a plea to the plaintiff's declaration, the plaintiff answered the plea, &c. If the issues are not made up, the court will require the party who has omitted any necessary step which he should have taken, immediately to complete his pleadings, unless from the circumstances of the case it should be deemed proper to afford him further time to do so. If he fails or refuses to plead when so ruled or required, a judgment of the

If the defendant makes default, in what cases will the court proceed to render a final judgment for the proper amount? In what cases is a preliminary judgment rendered? How is the amount of the final judgment to be rendered then ascertained? What is a jury, called to inquire into the damages only, styled? What questions does such a jury take cognizance of? If both parties appear, how are they required to make up their pleadings? If the defendant fails to plead, what follows?

same nature as a judgment by default will be rendered against him, for the want of a plea. It is called a judgment by *nil dicet*, or because the defendant *says nothing* in bar or preclusion of the plaintiff's action.

If an issue of law is raised, by a demurrer to the declaration or to any of the subsequent pleadings, the court proceeds to dispose of it, by deciding the point of law involved, and either overruling or sustaining it.

When, by these various preliminary proceedings, the parties have made up their issue or issues of fact, they are usually asked if they are ready for trial. If either of them is not ready, he must show some good reason for his not being so; for, otherwise, as it would be unreasonable to keep the opposite party waiting in court, the trial will not be delayed. Both parties must use reasonable diligence to be in readiness for trial when the cause is called; and if their want of preparation is owing to their own neglect, as the non-attendance of witnesses when the proper steps had not been taken to procure their attendance by the party needing them, such want of preparation will not be deemed a sufficient reason for postponement.

If, however, either party, in consequence of the want of something necessary to sustain the issues on his part, as the absence of a material witness, without whose evidence he could not make out his case, is not prepared for trial, and all reasonable diligence had been used unavailingly to make the necessary preparation, he may ask a *continuance*—which is a postponement of the case until the next term of the court. Generally, the party apply-

What is a judgment rendered for the want of a plea called? Why is it so called? How does the court dispose of demurrers? When the issues are made up, what is next done? If either party is not ready for trial, what must he do? What diligence must the parties use to prepare for trial? What is a continuance? In what cases may a continuance be obtained?

ing for a continuance is required to make an affidavit, or statement in writing, sworn to, of the reasons for which he asks it, and, when granted, it is at his costs, which embrace all the expenses caused by the postponement.

If both parties are ready, or no sufficient cause is shown for a continuance, it then remains to ascertain the truth of the facts disputed; and for this purpose a jury is called, or the case is submitted to the judges, to hear and determine what are the true facts according to the evidence adduced.

It may be here observed, that in actions commenced before justices of the peace, and other magistrates who have no regular terms of court, the course of proceedings is somewhat different from that above mentioned; but the general rules with regard to appearances, defaults, and pleadings, when pleadings are necessary, are the same.

CHAPTER LVII.

OF THE JURY.

By the policy of the ancient law, the jury was to come from the *vicinage* or neighbourhood of the place where the cause of action arose, for the people living in the vicinity were considered the very *country* to which the litigants had appealed; and being acquainted beforehand

How is a continuance usually applied for? At whose costs is it granted? What expenses do such costs embrace? If both parties are ready, what then remains to be done?

What was the policy of the ancient law as to the neighbourhood from whence the jury was to come? On what reasons was this policy founded?

with the characters of the parties and their witnesses, they were supposed to be the better qualified to judge of the facts alleged in evidence.

But this advantage was found to be overbalanced by another consideration; namely, that jurors coming out of the immediate neighbourhood were apt to be influenced by their partialities or prejudices in the trial of the rights of the parties. They were liable also to be improperly influenced, by having previously heard partial or imperfect statements of the facts, from one or the other of the parties or their friends; and no preference is now given to jurors of the immediate vicinage. A juror is, indeed, considered legally disqualified from serving, if, through partiality, prejudice, the hearing previous statements of the facts, or any other cause, he is unable to form an impartial opinion of the merits of the controversy, solely from the evidence that may be adduced upon the trial.

The ordinary number of persons composing a jury is twelve, but the statute laws of the states provide for the trials of some causes—though these instances are not common—by a less number.

When the issues are joined between the parties, in the manner heretofore explained, the court orders a writ, called a *venire facias*, to be issued, commanding the sheriff to summon, or *cause* twelve good and impartial men *to come* and try the issues so made. But in the superior courts, where juries are required, it is customary to summon, previous to the sitting of the court, a certain number of properly qualified citizens to attend the court during its sittings, and act as jurymen whenever called upon. In such cases, the order for the issuing of a *venire facias* is merely matter of form.

How were the advantages of a jury of the vicinage overbalanced? What is the number of persons composing a jury? How are the jurors summoned?

The cause being ready for trial, twelve of the number thus in attendance are called into the jury-box; and if that number cannot be obtained from those so in attendance, who are called the *regular panel*—either because they may be absent when called, or because for some reason they may be disqualified from serving in the particular case—the sheriff is usually directed by the court to make up the requisite number from the by-standers or other persons who can be conveniently found. Persons so summoned to supply deficiencies of the regular panel are called *talesmen*.

When the proper number of persons to compose the jury are thus present, the parties are asked by the court if they are satisfied with the jurors. Either or both parties have the right to *challenge* peremptorily, or without assigning any cause, a certain number of the jurymen thus provided. This number varies, according to the nature of the case called for trial, and is regulated by the statute laws; the object being to have the case tried by a jury selected as nearly as is possible by the parties themselves.

When the parties have challenged as many of the jurors as they are permitted to challenge peremptorily, they must accept the jury, unless some of the jurors are disqualified from serving—which they may be by being related to either of the parties, or by having formed or expressed an opinion beforehand in relation to the question in controversy, which would prevent them from coming to an unbiassed conclusion from the evidence to be adduced. In such cases they may be challenged *for cause*, that is,

How is the jury made up when a cause is ready for trial? What is the regular panel? What are talesmen? What right have the parties to challenge jurors peremptorily? When they have exhausted their right to challenge peremptorily, what must the parties do? How may they challenge for cause?

for being so disqualified; and if either of the parties desires to interrogate the jurors on these points, he may have them severally sworn to answer such questions as may be propounded to them touching their qualifications as jurors.

When a juror is challenged, he is directed to retire, and another is summoned in his place; until, at length, the requisite number is obtained. They are then sworn to try the issues submitted to them, and to render a true verdict according to the evidence.

The peculiar province of the jury is to determine questions of fact, or whether the matters of fact alleged upon the one side and denied upon the other are true. All questions of law arising upon the investigation of the case are determined by the judges.

CHAPTER LVIII.

OF THE PROOF.

As has been already stated, the party who asserts the affirmative of an issue is bound to prove the truth of the facts so asserted. Whenever, therefore, the issue depends upon a fact or facts asserted by one party and denied by the other, the party asserting them, whether plaintiff or defendant, commences by offering his proof. After he has offered all the evidence he has, or all that he deems necessary, the other party offers such as he can to contradict

How are the jurors sworn? What is the peculiar province of the jury?

Who commences offering proof on a trial?

the evidence of his opponent, or to show that his assertions are untrue. The nature of the proof that may be offered, and the various rules which it has been found necessary to establish in relation to it, constitute a very important branch of the law.

Proof signifies that which demonstrates, makes clear, or establishes satisfactorily to the minds of the judges or to the jury trying a cause, the truth of the facts or matters put in issue by being alleged on one side and denied on the other. As has been already seen, the party who asserts the existence of such facts, by the terms of his pleadings proffers his readiness to prove them; and when the issue is ready to be tried, he offers his evidence for that purpose.

When evidence is thus offered, the judges decide all questions as to its *competency*, or its admissibility under the particular circumstances of the case; but it is the province of the jury to determine upon its *credibility*, or as to what degree of weight it should have upon their minds when admitted. That is, the judges decide whether any particular evidence offered by either party shall or shall not go to the jury for their consideration; but when any evidence is once permitted to go to the jury, the latter may give what degree of credit to it they may think it deserves.

All evidence should be *relevant*, that is, it should be pertinent to and have some tendency to prove or disprove the facts really in issue. Otherwise, it will be excluded; or, if given before its irrelevancy is clearly perceived, the judges will instruct the jury to disregard it; for the introduction of matters having no bearing on the point in issue is calculated, not only to consume the time of the court

What is proof? How is the competency of evidence determined? Who decides upon its credibility? What rule is there as to relevancy? Why is irrelevant evidence excluded?

unprofitably, but to confuse the minds of the jury and distract their attention from the real merits of the case.

Written evidence consists of the records of courts, deeds, wills, and other instruments in writing, which are offered in proof of the matters therein recited. *Parol evidence* is such as is given from the mouths of witnesses.

There is one general rule applicable to all trials, which is, that the *best* legal evidence the nature of the case will admit of is always required, if it can possibly be had; but if the best evidence cannot be had, then the next best legal evidence may be admitted. The reason of this rule is, that if there be any better evidence existing than that which is produced, the very fact that the party who is making the proof does not produce it, affords ground for the suspicion that it would have detected some material matter which he wishes to conceal.

Thus, when two or more persons make a contract or agreement in writing, that writing is the best evidence of what their intentions and stipulations really were; for their object in putting the terms in writing must have been to preserve a testimonial of their precise agreement, more certain and accurate than could be expected to be preserved in the memory of persons who might have been present. Whenever, therefore, either of the parties have occasion afterward to prove that such a contract was entered into, they must produce the writing if it is in existence and can be found.

If a witness who is giving parol testimony commences to state the particulars of a contract, he may be asked by the party against whom he is testifying, if such con-

What is written evidence? What is parol evidence? What rule is there as to the best evidence? What is the reason for that rule? Give an example to explain this rule? When a witness is giving parol testimony, how may it be ascertained whether the evidence he is giving is in writing?

tract is or was in writing; and if it was made in writing, he will be immediately stopped from giving any evidence of it, until the written instrument is produced or its absence accounted for. If it has been destroyed, or if it has been lost, so that, after diligent search in the proper places where it should have been kept, or inquiry of the persons who should have had the custody of it, it cannot be found, then parol evidence of its contents may be given.

Upon the same principle, when, at the making of a deed or other contract in writing, a person is called upon to subscribe his name to it as a witness, if it becomes necessary afterward to prove the execution of the instrument, the subscribing witness, if he is living and within the jurisdiction of the court, must be called for that purpose. The principle is, indeed, carried so far that if the subscribing witness cannot be obtained, and it therefore becomes necessary to admit proof of the handwriting, the signature of the subscribing witness, and not that of the principal obligor, must be proved if possible.

When the best evidence cannot be had, the next best is only admitted from the necessity of the case, because, otherwise, it would be impossible to produce any testimony of the fact in question. It is sometimes called *secondary evidence*, and it is always considered less satisfactory than *primary evidence*, or that which should have been produced but for its loss.

The record books of courts, as well as copies of matters contained in such records, duly certified under the seals of the courts in which they are preserved, are said to prove themselves. That is, the courts before whom they are

When may parol evidence be given of the contents of a written instrument? How is the principle exemplified in the case of a subscribing witness? When the best evidence cannot be had, why is the next best admitted?

produced in evidence are supposed to have sufficient knowledge that they are truly such records, from an inspection of the original books, or from the seals attached to the certificates in the case of copies; and no other evidence need be introduced to prove their authenticity.

So, also, deeds and wills, when possession of property has been held under the provisions contained in them for a long period of time, as for more than thirty years, are sometimes admitted in evidence without proof of their execution. In these cases, the possession of the property described, according to the terms or limitations of the instrument, is supposed to afford so strong a presumption in favour of the authenticity of the instrument itself, as to supersede the necessity of any other proof of the validity of its origin or of its execution.

Other writings offered in evidence must be proved to be authentic before they will be received; and such proof is made by calling upon the subscribing witnesses, if there are any, to testify that the instrument was *executed*; that is, that it was signed or sealed by the persons whose names are attached to it as principals. When there are no subscribing witnesses, its execution may be proved by any witnesses who are acquainted with the handwriting of the persons whose signatures are appended to it.

When a witness is called for the purpose of proving the signature to an instrument, it is customary first to ask him if he is acquainted with the handwriting of the person whose signature is to be proved; and if he answers in the

What preliminary proof is necessary before writings are given in evidence, in the case of record books and copies of records? In the case of deeds and wills, when possession of property has been held under them? In the case of other writings? How is proof of the execution of an instrument made? What are the questions usually asked of a witness called to prove the signature to an instrument?

affirmative, he is then asked if he believes that to be the signature of such person. If he also answers the latter question in the affirmative, it will be sufficient proof of the execution of the writing, unless the weight of his opinion is lessened by showing that his knowledge of the handwriting is slight or inadequate, or other testimony is introduced by the opposite party to show, notwithstanding his testimony, that it is not the true signature of the person whose name is attached to it. It is obvious that with regard to this, as to any other fact, there may be conflicting evidence; and it may, therefore, be necessary to decide whether, upon the whole of the evidence given, the signature should be regarded as sufficiently proved or otherwise.

In civil suits, it is a rule that in all cases where there is contradictory or conflicting evidence, the decision must be given in accordance with that which preponderates, or that which, upon the whole, appears to have the greatest weight, or to be the most satisfactory. In criminal cases, however, the rule is different. There, in accordance with the humane principles of the law, which would suffer none to be punished without satisfactory proof of guilt, and which considers it better that the guilty should go unpunished than that a hazard of punishing the innocent unjustly should be incurred, the proof of the crime charged must be sufficient *beyond all reasonable doubt*. It is not meant by this, however, that one charged with a criminal offence should never be found guilty if the judge or jury might possibly raise a doubt as to the effect of the evidence; but the doubt that would prevent a conviction should be such as a reasonable person, in the exercise of a sound and discriminating judgment, might be supposed to entertain.

What is the rule where the evidence is conflicting, in civil cases? In criminal cases? What is meant by proof beyond all reasonable doubt?

CHAPTER LIX.

OF WITNESSES.

ALL suitors have a right to the attendance of such persons as may have any knowledge of the facts in controversy, to testify on their behalf; and to this end either party may, upon request, have a writ called a *subpœna* issued by the court or magistrate, to compel the attendance of witnesses.

By the English law, no witnesses, unless summoned to give evidence within the bills of mortality in which their residence was situated, could be required to appear or testify unless their reasonable expenses were first tendered them by the party desiring their testimony. In this country, it is sometimes necessary to pay or tender such expenses when the witness resides out of the county to which he is subpœnaed; but this is a matter which is regulated by the statute laws of the several states, and it will be necessary to refer to those statutes to ascertain in what cases such a tender is necessary.

If a witness, when duly subpœnaed, and when his expenses have been tendered if such a tender was necessary, fails or refuses to appear, it is deemed a contempt of the authority of the court, and a writ called an *attachment* will be issued to the sheriff or other proper officer, requiring him to bring forthwith such defaulting witness in person before the court, to answer for such contempt.

What rights have suitors to procure the attendance of witnesses? What is the law as to tendering witnesses their expenses? If a witness refuses to attend, what is the consequence? How is his attendance enforced?

When a witness appears to give evidence, the first question that will naturally arise is as to his *competency*, or fitness to give evidence in the particular case. All persons, except such as have been convicted of some infamous crime by the sentence of a court; and in some of the states such as are interested in the event of the suit, having their reason and an understanding of the obligations of an oath, are competent to testify, though their credibility may be affected by other circumstances.

If a witness is a child, or a person of apparently weak intellect, he may be questioned with a view of ascertaining his reasoning powers; and with this view it is common to ask such persons if they believe in the existence of a Supreme Being, and have a knowledge of the consequences of false swearing. If, on such interrogation, the witness is found to be clearly deficient in reasoning faculties, he will be discharged by the judges, who will not permit him to be examined.

In some of the states Indians are excluded from giving testimony in suits against white persons; but in suits between persons of the same description they are examined as other witnesses.

Before being sworn to give evidence in the suit, the party opposed to the party by whom he was called may require the witness to be sworn to give true answers to such questions as may be propounded to him touching his competency. When so sworn, he should not be asked any questions relative to his religious opinions; for though a witness may be rejected for a total unbelief in a Supreme Being or in future rewards and punishments, as such a

What persons are competent to give testimony? How is incompetency from weakness of intellect ascertained? What is the law as to the competency of negroes, mulattoes, and Indians? How may a witness be interrogated as to his competency? May he be questioned as to his religious belief?

person will be regarded as incapable of being bound by the religious or moral obligations of an oath, such a want of belief must be proved by other evidence.

Nor, in general, can a witness be asked any question the answer to which may tend to criminate himself or render him liable to a penalty. He may be asked if he is interested in the event of the suit, and if found so interested, even in the slightest degree, his testimony will be excluded. But his interest must be one which is direct and consequent immediately on the determination of the suit—not one that is consequential, or results secondarily. He must gain or lose something by the decision or judgment in the cause in which he is called to testify: if he does not, and if the record of such judgment cannot be evidence either for or against him in another suit, he will not be incompetent on the ground of interest.

The reason for the rule which in some states renders an interested witness objectionable is founded on the motive his interest is supposed to inspire, to state what is false or to pervert or suppress the truth. There could not be any such motive when the testimony he is called upon to give would be against his own interest, and in that case he would not be incompetent. And when the interest arises from some obligation which the witness has incurred to the party calling him, and which may be extinguished or lessened by the effect of his evidence, the objectionable motive may be removed and his competency restored by a release from all liabilities incurred by such obligation.

How is his incompetency from want of such belief ascertained? Can he be made to criminate himself by his answers? What amount of interest will render him incompetent? What kind of interest must it be? What is the reason for excluding an interested witness? If his testimony would be against his interest, would he be incompetent? How can his competency be restored in some instances?

When, after such preliminary examination, it is found that the witness is competent, he is sworn to tell the truth, the whole truth, and nothing but the truth, touching the matters in controversy between the parties. He then makes his statement in the hearing of the judges, the jury, and the parties. If he omits to state any thing the party calling him wishes him to state, he may be questioned; but when questioned by the party calling him, the questions must not be *leading*; that is, they should not, by the words used or the manner of putting them, indicate to the witness what he is desired to state. If such leading questions are put, the judges, at their own will, or at the request of the opposite party, will prohibit the witness from answering them.

The witness should state only such matters as are within his own knowledge from observation, and nothing which he may have derived at second hand from third persons. As a general rule, hearsay is no evidence, for evidence must be given under oath; and if the first speech was without oath, an oath that there was such a speech has no bearing upon its truth. Besides, if the speaker be living, he ought to be produced, because he is the best witness, and it would be only fair to give the opposite party an opportunity to cross-examine him.

There are some exceptions to this rule, arising from the cases in which they are applicable, and the difficulty or impossibility of procuring other evidence. Thus, the declarations of a person dying of an injury, as to who committed the injury, may be stated, if the injured person be dead, and the statements were made while he was in a

What is a witness sworn to tell? How must questions be put to him? What matters should the witness state? What is the general rule as to hearsay? What is the reason of the rule? Are there exceptions to this rule? Under what circumstances may the statements of a person who is dead be given?

dying condition, or after he had given up all expectation of recovery. It is supposed that a dying person would not wilfully state a falsehood to injure another, and that under such awful circumstances, standing as it were upon the brink of eternity, an oath could add nothing to his motives to tell the truth. So, if a person had formerly testified to certain matters in court, and had afterward died, witnesses may be called to state what he did testify in relation to such matters.

There are also some matters of tradition, or *common repute*, which may be hearsay, and which are yet admitted in evidence, such as the fact of the marriage, birth, or pedigree of persons. This kind of evidence is based upon the credit given to it by the community among whom the transaction took place.

What is said by the parties at the time of any particular transaction, as the commission of an assault and battery or the making of a contract, going to show the intention of the parties, may be given in evidence through the medium of witnesses who may have been present. What was so said is regarded as a part of the transaction itself, or of the *res gesta*, as it is termed, and may be proved like any other material fact, if it has a bearing on the matter in controversy.

The *admissions* of the parties to a suit, when such admissions are *against their interest*, in reference to the subject-matter in dispute, are also admissible, because it is not to be supposed such admissions would have been made unless they were true. And where a statement has been made to, or in the presence and hearing of one of

Give the reason for this exception. What exception is there as to matters of common repute? What is the credit given to this kind of evidence based upon? Can what was said by the parties at the time of the transaction be given in evidence, and why? Under what circumstances may the admissions of the parties be given?

the parties, it may amount to a tacit admission by him if not denied or contradicted, and be admissible as such. If, for instance, the suit was for a debt alleged to be due by an open account, and the plaintiff could prove that at a certain time he had presented the account to the defendant and told him it was a correct account, or had even spoken of it to third persons in such a manner that the debtor must have understood him as asserting the correctness of the account, this would be evidence of a tacit admission by the debtor that the account was correct, if nothing was said by him at the time to preclude such an inference.

The evidence of one credible witness is usually sufficient to satisfy a jury as to the facts stated by him, though, undoubtedly, the concurrence of two or more strengthens the proof, especially when there is any doubt. There are, however, two species of criminal prosecutions where the law requires two or more lawful witnesses to convict a prisoner; or, at least, the positive evidence of one witness, and such circumstantial testimony as would, in the opinion of the jury, be equivalent in weight to the positive evidence of another witness. These are prosecutions for treason and perjury. In the case of the crime of perjury, as it is necessary to prove the falsehood of the matter before sworn to by the prisoner, if there were but one witness to testify that the prisoner's oath was false, it would be but oath against oath. It is, therefore, deemed necessary that the statement of the witness should be corroborated by additional testimony, before the prisoner should be convicted.

How may tacit admissions be inferred? What is the number of witnesses required? When is more than one witness necessary? Why is more than one required to prove the crime of perjury?

CHAPTER LX.

OF THE EXAMINATION AND IMPEACHMENT OF WITNESSES

It is a common practice for each party, before commencing to introduce his evidence, to have all his witnesses called up and sworn. Each set of witnesses will then, if it is requested by the party against whom they are expected to testify, be required to retire without the court, so that they may not hear the testimony detailed by those who are first examined. The object of this separation is to compel each successive witness to rely upon his own sources of information, and to prevent those who are last called from conforming their testimony to that of those who may have preceded them.

The party having the affirmative of the issue then calls and examines his witnesses successively. He may commence at any part of his testimony he may think proper, but he should offer all the proof he intends to offer relative to the facts he wishes to prove, before he announces that he has closed. The court will not permit him to offer additional testimony to prove the same facts, or to endeavour to strengthen his case, after the other party has given his evidence, except by way of rebutting any new disclosures which may be made in the course of the testimony offered by his adversary.

If it were not for some rule of this kind, the time of the court might be unnecessarily taken up by reiterated at-

How are witnesses separated for examination? What is the object of their separation? To what extent must the party commencing offer his proof before closing? What additional testimony will he be permitted to offer after the other party has given his evidence?

tempts to make up deficiencies, which would, of course, involve the necessity of permitting the other party to do the same, and thus make the investigation interminable. It is sometimes, however, a matter of considerable difficulty to decide whether testimony thus offered should be regarded as original or rebutting evidence, and in such cases it is generally permitted to be given. The mode and manner of receiving testimony is, in a great measure, left discretionary with the courts, and they are never disposed to reject any thing which is calculated to throw light on the matter in dispute, or to enforce restrictive rules further than is absolutely necessary to protect themselves and the adverse parties from unprofitable and vexatious annoyances.

After a witness has been examined by the party calling him—which is called the *examination in chief*—he may be questioned by the opposite party, with a view to develop the sources of his information, to bring out any thing he may have accidentally or purposely omitted, or to show, if it can be done, that his testimony is unworthy of credit or of little importance, from the incongruity of his statements, or their falsity, or from his want of sufficient information. This examination by the opposite party is called the *cross-examination*, and is deemed a very important privilege, as under a series of such questions, judiciously put, it is extremely difficult for one guilty of false swearing to avoid being detected.

The rules by which cross-examinations are governed are the same as those applicable to the examination in chief, except that, as the witnesses may be supposed more reluctant to answer because less friendly to the opposite

What is the reason for restricting the party commencing to rebutting evidence? When the character of the evidence, as to its being rebutting, is doubtful, what is usually done? What is the examination in chief? The cross-examination, and its object?

party, leading questions may be put to him ; and questions may also be put the answers to which might be expected to have a tendency to discredit him. Questions of the latter character will not be permitted in the examination in chief, because a party is not allowed to discredit his own witness.

After one party has closed the examination of his witnesses, the other may introduce and examine those in attendance on his behalf, who will be liable to a cross-examination as in other cases. These witnesses may be introduced either for the purpose of contradicting the witnesses of the other party, or of rendering their testimony nugatory, by showing facts which do away its force and effect ; or of directly impeaching the credit of the opposite party's witnesses, by showing that they are unworthy of belief.

If a witness sustains so bad a character for truth and veracity that his statements under oath ought not to be believed, his testimony is, of course, entitled to no weight whatever. This is often attempted to be shown, by the introduction of witnesses to testify to the general character of a witness previously examined by the opposite party.

In such cases, the impeaching witnesses are not permitted to testify to any particular acts of bad conduct, as any one or more such acts might not be sufficient to establish what is understood to be a general bad character, and because evidence of particular acts should not be given against an individual without affording him an op-

How do the rules observed in cross-examinations differ from those of the examination in chief? After one party has closed examining his witnesses, what may the other do? How may the character of a witness for truth and veracity be impeached? To what particular acts of bad conduct may an impeaching witness testify?

portunity to defend or contradict them—which could not be done in this collateral way.

The first question usually asked the witness on the stand is—“Are you acquainted with the general character which A. B. sustains in the community for truth and veracity?” If he answers in the affirmative, he is then asked—“What is that character?” If he answers, “It is bad,” the question is then put to him, whether, from his knowledge of such general character, he would believe a statement made under oath by the said A. B. If he answers that he would not, the party examining him stops; and the other party may then cross-examine him, as in other cases, with a view to ascertain his means of knowing the general character of the person whose testimony is sought to be impeached, and whether or not the witness has some personal grudge or dislike which induces him so to testify.

The opposite party may, after the other has examined as many witnesses as he thinks proper to this point, call other witnesses to rebut their evidence, by stating that the general character of A. B. for truth and veracity is good; and after both parties have closed, the jury must decide, with the other points in the case, whether the character of A. B. as a witness has been successfully impeached or not. In all cases, indeed, the jury must, from what has been said or detailed in the course of the examination in chief and the cross-examination, the appearance and manner of the witnesses, and all the attendant circumstances, place whatever degree of reliance on any or all of the testimony offered they may think it deserves.

It not unfrequently happens that the testimony of different witnesses may be apparently conflicting, and yet

What are the questions usually asked an impeaching witness? How may the opposite party controvert the testimony of impeaching witnesses? How is it determined whether a witness has been successfully impeached or not?

that all of them may have told the truth; and it is, therefore, a general rule that if such conflicting testimony can be reconciled, it shall all be presumed to be true, when none of it has been successfully impeached.

The testimony of witnesses is sometimes given in the form of *depositions*, which are the statements of witnesses taken under oath, and written down by a magistrate or other officer duly authorized to take them. The mode in which depositions must be taken, and the cases in which they may be used, are pointed out by the statute laws of each state. The student must, therefore, look to the statutes for information as to those points. They are, however, usually considered less advantageous than the oral examination of witnesses, and are, therefore, in suits at common law, only permitted to be used when such oral examination cannot be had.

Among the cases in which depositions are permitted to be used are those where the witness whose testimony is desired is sick, and unable to attend the court; or when the witness resides out of the jurisdiction of the court, and could not be subpoenaed—as in another state or another country; or is absent, so that his attendance could not be procured. Sometimes, after a suit has been instituted, but before the trial, it is ascertained by a party that a witness is about to go without the state or to some foreign country, and will probably be absent when the trial comes on; in which case his deposition may be taken, to be used in case the witness is actually absent when the trial takes place.

It is always necessary to give the opposite party such notice of the time and place of taking a deposition as to enable him to attend, or procure some suitable representa-

When conflicting testimony can be reconciled, what is the rule? What are depositions? When are they permitted to be used, as a general rule? Mention some of the cases in which depositions are used? What notice must there be given to the opposite party of the taking?

tive to attend and cross-examine the witness, if he thinks proper to do so. At such time and place the witness is brought before the officer who is to take the deposition, and after being sworn in the same manner as before a jury to state the truth, the whole truth, and nothing but the truth in relation to the cause depending between the parties, the officer proceeds to write down his answers to the questions propounded by the party calling him, and afterward his answers to the questions of the opposite party, if any such are asked.

The same rules as to leading questions and other matters relating to the reception of evidence are observed in the taking of depositions that are applicable in oral examinations before a jury.

When the answers of the witnesses examined are all written down, the deposition is properly certified by the officer taking it, who then seals it up and transmits it to the clerk or other proper officer of the court in which it is to be used. At any time after it has been received by such officer, either party may, upon motion, procure an order of the court to have it *published*. This is done by breaking the seal of the officer by whom it was taken, and it is then open to the inspection of the parties.

If the opposite party find, upon its publication, that it was improperly taken, as if taken without sufficient notice, or before an unauthorized person, or that it was not properly certified, he may make a motion before the court to have it *suppressed*. Or, if any part of it is objectionable, as if some of the answers are made to leading questions, or are irrelevant, or consist of matters of hearsay, he may move to have such parts of it suppressed.

How are depositions taken? What are the rules observed in taking them? What is done with a deposition when the answers are all written down? How may either party procure its publication? What is meant by publishing it? For what causes may depositions or parts of them be suppressed?

Depositions or parts of depositions that are suppressed are not permitted to be read upon the trial; but motions to suppress should be made before the trial is commenced, in order that, if circumstances require it, other depositions may be taken to supply the place of those suppressed.

CHAPTER LXI.

OF THE ARGUMENT, INSTRUCTIONS, AND VERDICT.

AFTER both parties have offered all their evidence, they or their counsel offer such arguments as they may think proper, in support of their respective views of the effect of the whole evidence, and of the questions of law arising in the case. Great latitude is usually allowed in the discussions at the bar, as it is considered desirable that each party should be at liberty to say every thing he could reasonably desire, before a final judgment is pronounced. There is, of course, a discretionary power in the court to check the speakers, and even to punish them by fine and imprisonment for insolent or disrespectful remarks, or for any other abuse of their privileges amounting to a contempt of the court.

It is the common rule that the party having the affirmative of the issue is entitled to open and close the argument; that is, to make an opening speech by way of a statement of the grounds of his case, and then, after the other party has said what he may desire, to close the ar-

When should motions to suppress be made? What is the effect of suppressing a part or the whole of a deposition?

How is the argument conducted? Who is entitled to open and close?

gument by a speech in answer to what has been so said. When there are several issues, and both parties have the affirmative in one or more of them, the plaintiff is entitled to open and close, as he has then the affirmative of the whole case to maintain.

The argument being concluded, if the case is tried by a magistrate or judge, without a jury, the decision is given and a judgment rendered according to the nature of the case. If the judge is not ready to give his decision immediately, he is said to take the case *under advisement*, until such time, within the period prescribed by the statute laws, as may be necessary to arrive at a satisfactory conclusion.

If the case is tried before a jury, after the argument is concluded the judges give such instructions relative to the questions of law involved as they may deem necessary to enable the jury to make a proper application of the evidence, and thus determine in whose favour they should find the issues. If the judges omit to do this, either party has a right to request such instructions to be given. They should, however, put the instructions they wish given in writing, and if, when so written, the law is stated correctly and they are relevant or pertinent to the case, the judges will or ought to give them.

After receiving their instructions, the jury—unless the case is so clear that they can come to a unanimous decision without leaving their seats—retire to some private room to consider their verdict. Here they are kept entirely secluded from communication with any other persons, and usually without food, until they are unanimously agreed.

Who is entitled to open and close when there are several issues? How is the decision given? How are instructions given? What rights have the parties to have instructions given? What does the jury do after receiving instructions? How are the jurors kept while consulting upon their verdict?

Formerly, they were required to be kept without meat, drink, fire, or candle. They are always under the charge of a bailiff. If they speak with either of the parties or their agents, or receive any new evidence after leaving the court-room, or if to hasten a decision they cast lots for whom they shall find, or if their verdict is influenced by any other improper and unlawful acts, it will be entirely vitiated, and will be set aside at the request of the losing party.

It has been held in former times, that if the jurors did not agree upon their verdict before the judges were ready to leave the town or place where the court was held—though they were not to be threatened or imprisoned—the judges were not bound to wait for them, but might carry them round the circuit in a cart, or have them dumped out in the high road, as a punishment for their contumacy. There is no instance of such a course being pursued in modern times. The court may require them to be kept together as long as it is deemed expedient; but usually when it is found they cannot agree they are discharged, and the case is tried anew.

The form of the verdict varies with the nature of the case. It purports to be a finding for one or the other of the parties; and when any sum of money is sued for, either as a debt or as damages, it ascertains and fixes the amount. An error in mere matter of form is generally immaterial, if it is correct in substance, and sufficiently definite and certain to enable the court to render a judgment in accordance with it.

When the jury have agreed upon their verdict, they are conducted by the bailiff who attends them to the court. Upon taking their seats, they are asked by the judge

What will vitiate their verdict? What is done with the jurors if they do not agree? What is the form of the verdict? What effect have errors in matter of form?

if they have agreed ; whereupon some one of their number appointed to act as foreman announces that they have, and presents the verdict in writing. It is then read by the clerk, and if there is any error in mere matter of form it will be corrected, under the direction of the judge, before it is entered of record.

Sometimes, when there is a point of law involved in the case which the jury do not understand or are unwilling to decide upon, they will return a statement of the facts as they find them to be proved ; concluding, that if, upon such statement of facts, the judges should be of opinion that the law is for the plaintiff, they find for the plaintiff—otherwise, they find for the defendant. This is called a *special verdict*, because in it are found the special facts of the case only, and it leaves the result to be determined by the judges, according to the bearing of the law upon such a state of facts.

If either party thinks he has reason to believe that any of the jurors did not fully consent to the verdict, he may have the jury *polled* ; which is done by having the name of each juror called, and the question put to him whether the verdict read is his verdict. If they all answer in the affirmative, the verdict is received and recorded ; but if any one or more say it is not, the jury will be sent back to their room to endeavour to come to an agreement.

When the jurors have agreed, what do they do ? How is the verdict presented and disposed of ? What is the nature of a special verdict ? How may either party ascertain whether all the jurors have agreed to the verdict ? How is a jury polled ? What is the result if any one or more of the jurors have not agreed to the verdict ?

CHAPTER LXII.

OF MOTIONS FOR AN ARREST OF JUDGMENT OR A
NEW TRIAL.

UPON the return of the verdict, if either party thinks that notwithstanding the verdict a judgment ought not to be pronounced against him, he may endeavour to prevent it, by making a motion for an arrest of judgment or for a new trial.

A judgment will be *arrested*—which means that the verdict will not be carried out by the entry of a judgment upon it—only because of intrinsic causes appearing upon the face of the record. As if the verdict varies materially from the pleadings and issues, and is not responsive to them; or if the cause of action is so defective as to show no legal ground for the suit; or if the issue be joined on a fact wholly immaterial. In the two latter cases, the losing party might have demurred, and thus cut the suit short at an earlier stage; but though he did not, the other cannot have a judgment.

When a judgment is arrested, the result, as to the rights of the parties, is the same as if there had been no trial; and, therefore, the plaintiff may commence another suit. In some cases, however, the court will order a *repleader*—which is a direction to the parties to commence anew with their pleadings from the point where the defect occurred, and proceed to a second trial.

How may the rendering a judgment be prevented after the return of a verdict? For what causes will a judgment be arrested? Give some instances. What is the result as to the rights of the parties, when a judgment is arrested? What is a repleader?

The causes for suspending the judgment by granting a *new trial*, may arise from matter foreign to, and which does not appear upon the record. If there has been any flagrant misbehaviour of the successful party, such as tampering with any of the jurors or witnesses; any gross misbehaviour of the jury; or if the jury brings in a verdict which in the opinion of the judges is clearly contrary to law, or to the legal effect of the evidence; or, in some cases, if the losing party, after the trial and before a judgment is rendered, discovers evidence which he did not know of and could not by the exercise of reasonable diligence have discovered, and which would have produced a different result;—it is customary to grant a new trial, in order that justice may be done. But if the second trial results in the same verdict as the first, a third trial will seldom be granted.

The party wishing a new trial makes a brief statement in writing of the grounds on which he moves for it, and thereupon the court makes a rule requiring the opposite party to *show cause* why a new trial should not be granted. If, upon hearing the arguments of the parties, the judges are of opinion that the causes or reasons assigned do not exist, or are not sustained, the rule is *dismissed*, and a judgment is rendered on the verdict. If, however, the judges think a new trial ought to be granted, the rule is *made absolute*, and the judgment is suspended.

When the cause assigned depends upon facts not known to the judges, it is usual to require affidavits of such facts in support of the motion for a new trial. If it is for newly discovered evidence, the losing party must file an affidavit stating that he did not know, and had no means

How do the causes for granting a new trial arise? Give some examples. How is a new trial applied for? What rule does the court make on such application? How is this rule disposed of? When are affidavits required?

of discovering before the trial by such diligence as he could have used that such evidence was in existence, or could have been procured in time for the trial; and this must be accompanied by an affidavit of the witness who is expected to give the evidence, detailing the facts known by him, and which he can state if examined for that purpose. The object of these affidavits is to give the judges sufficient assurance that new evidence can be produced, and also to inform them what it is, so that they may be informed as to its materiality, or whether it would be likely to produce a different result should a new trial be granted.

New trials are awarded under the sound discretion of the court. When granted, the cause is heard before another jury, and no inference is to be drawn from the former verdict for or against either party. They are not greatly favoured by the courts, and ought not to be granted where the matter in controversy is so trifling as to be unworthy a second examination, or upon nice and technical objections which do not reach the real merits, or when the evidence is so nearly balanced that neither side has any decided preponderance.

What must the affidavits contain when the cause assigned is newly discovered evidence? What is the object of these affidavits? When a new trial is granted, what is done with the cause? When ought new trials to be refused?

CHAPTER LXIII.

OF THE JUDGMENT.

A JUDGMENT is defined to be the sentence of the law, pronounced by the court, upon the matter contained in the record. It is not the sentence or determination of the judges, but it is the conclusion which naturally and regularly follows from the premises of law and fact which the record of the preliminary proceedings in the case discloses.

There are two kinds—called interlocutory and final judgments. *Interlocutory judgments* are such as are given in the progress of a cause upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the case. An instance of such a judgment is found in the case of an action for damages when the defendant does not appear, or when, having appeared, he confesses the cause of action by resting his defence on a demurrer. Here, the court first renders an interlocutory judgment that the plaintiff has a sufficient cause of action, and a jury is then called to assess the amount of damages which he has sustained.

A *final judgment* is one which at once puts an end to the suit, by declaring that the plaintiff either is or is not entitled to the remedy he seeks. Of this nature is the judgment which is rendered, after a jury has estimated the damages, for the recovery of the damages assessed.

The form in which the judgment is entered necessarily varies according to the nature of the action and the pre-

What is a judgment? What is an interlocutory judgment? Give an example. What is a final judgment? Give an example.

vious proceedings. As has been before stated, all these proceedings are noted down, at the time of their occurrence, in a book kept in the court, and, when put together, these entries form a complete record of all the important steps taken, and all the decisions made in the cause.

In an ordinary case—an action of debt, for instance—this record will show: That on the — day of —, the plaintiff filed his declaration, in the following words and figures: (Here follows the declaration.) That afterward, on the — day of —, the parties appeared, and the defendant says said declaration and the matters and things therein contained are not sufficient in law. And the plaintiff says his said declaration is sufficient in law. And thereupon the court, being sufficiently advised, was of opinion that the said declaration is sufficient in law; and it is considered that the demurrer of the defendant be overruled.

The above is an interlocutory judgment. The record will then show: That afterward, on the — day of —, the defendant had leave to withdraw his demurrer and plead to the declaration; and thereupon, the defendant comes and says he does not owe the debt in the plaintiff's declaration mentioned, and of this he puts himself upon the country. And the plaintiff doth the like. That afterward, on the — day of —, the parties came, and the issue being joined, also came a jury, to wit, twelve good and lawful men of the country, (naming them,) who being duly elected, tried, and sworn well and truly to try the issue joined by the parties, after hearing the evidence and arguments of counsel, and the instructions of the court, retired to their room under charge of

How does the form of a judgment vary? State the substance of the record of an action of debt, showing a demurrer overruled. What kind of judgment is that? What does the record further show up to the return of a verdict?

a sworn bailiff, to consult upon their verdict. And afterward, on the — day of —, the jury of whom mention is within made return into court and present their verdict as follows:—"We the jury find the defendant does owe the plaintiff — dollars for his debt, and — dollars for the detention thereof."

Here, if the defendant makes an unsuccessful attempt to obtain a new trial, the record will continue as follows: And thereupon the defendant moved the court to grant him a new trial in this cause, and filed the following reasons therefor: (here they are inserted,) and a rule is granted on the plaintiff to show cause why a new trial should not be awarded. And afterward, on the — day of —, the parties came, and the plaintiff showed cause against the granting of a new trial; and after hearing the arguments of counsel and inspecting the premises, the court, being fully advised, is of opinion that a new trial ought not to be granted, and it is considered that the said rule be discharged. (This is also an interlocutory judgment.) And thereupon it is considered that the plaintiff recover of the defendant the sum of — dollars for his debt, and — dollars for the detention thereof, making together — dollars; and also his costs in this behalf about his suit expended. (This is the final judgment.)

Of course, it will often happen that a record will be much longer than this, and some, perhaps, will be shorter. This depends upon the nature of the proceedings. Every thing material to show the jurisdiction of the court, the nature of the cause of action, and the issues made, should be shown, and the final judgment is then framed accordingly. Thus, if the defendant did not appear and plead,

If the defendant then makes an unsuccessful attempt to obtain a new trial, what does the record contain up to the final judgment? What should the record show?

the record should show that process had been duly served upon him, in order that it may appear he had notice of the suit. So, if the action be one of replevin for the recovery of a specific article, as the plaintiff acquires possession by the writ of replevin before the trial, if the judgment be for the defendant, it is that he have the property returned to him.

A judgment thus solemnly rendered, by a court having jurisdiction of the cause of action and the parties, is final and conclusive, and can never be controverted, set aside, or disregarded, within the state or jurisdiction where it is rendered, unless it is reversed or annulled by some superior court, or by the same court, on proceedings expressly instituted for that purpose.

Judgments are, in most of the states, *liens* upon all the real property of the defendant from the date of their rendition; and therefore, if the judgment debtor sells his lands after that date, they will still be liable, though in the hands of the purchaser, for the payment of the judgment.

CHAPTER LXIV.

OF APPEALS AND WRITS OF ERROR.

As has already been seen, in our system of jurisprudence there are courts of various grades. Some possess jurisdiction of certain cases only, and in cases involving only a certain amount of property; others have jurisdiction to an unlimited extent; but from both these classes

How far is a judgment conclusive? How does it affect the property of the defendant?

there are appeals allowed to courts of a superior jurisdiction, for the correction of any errors which either party may complain of.

An *appeal* from an inferior to a superior court is usually granted to either party upon his application, and upon certain conditions; as upon his giving security for the payment of the debt and costs if it is the defendant who appeals, or for the payment of the costs if it is the plaintiff, if judgment be finally given against him. When an appeal is granted, all the proceedings in the inferior court are suspended, and the parties with their cause are transferred to the court to which the appeal is taken.

In some cases, upon an appeal the whole cause is tried over again, and a judgment rendered upon its merits. In other cases, only the record or history of the cause as it was tried in the inferior court is taken to the superior court, and the erroneous decisions of the inferior court, if any such were made, are inquired into and corrected.

An appeal must be prayed for or requested within a certain limited time prescribed by the statute laws. This time, in the case of judgments pronounced by justices of the peace, is usually from thirty to sixty days. In the case of judgments in the higher courts, appeals must generally be taken at the term at which the judgments appealed from are rendered.

Though all the decisions of an inferior court upon material points arising in the cause may be reviewed on appeal, yet usually an appeal cannot be taken until the final judgment is rendered; because, otherwise, there might be frequent appeals in the same cause; and if the final decision should be in favour of the party who com-

For what purpose is an appeal allowed? How is an appeal obtained? What are the conditions usually imposed? How does the case stand when an appeal is granted? How is a cause tried on appeal? At what time must an appeal be prayed for? At what stage of the cause can an appeal be taken?

plaints of the interlocutory decisions, an appeal would be useless and unnecessary.

If an appeal should not be taken within the time required, and either of the parties think the inferior court committed any material error, the decision may be reviewed by means of what is called a *writ of error*. This is a writ issued or supposed to be issued by a superior court to an inferior court of record, requiring such inferior court to send up the record of a cause, in order that the alleged errors or mistakes in the proceedings may be examined, and corrected if necessary.

There is also a time limited by the statute laws within which such writs of error must be issued, as within five years. The statutes of some of the states further provide that no writ of error need in fact be issued, but that the party complaining of errors may procure a transcript or copy of the record of the cause from the inferior court, and file it in the superior court, or in the office of the clerk thereof, with an endorsement specifying the errors complained of. This endorsement is called an *assignment of errors*; and upon the record being thus filed, a summons is issued to notify the opposite party of the pendency of the cause in such superior court, and it is then placed upon the docket of that court for trial. The case then proceeds as if a writ of error had actually issued, or as if an appeal had been taken.

When a transcript or record is filed for the purpose of being reviewed in this manner, the judges of the superior court may cause a writ to be issued to stop all proceedings by execution or otherwise in the inferior court, until the

If an appeal should not be taken within the time required, how may the cause be taken to a superior court? Within what time must a writ of error be taken? What is the course pursued when no actual writ of error is issued? What is an assignment of errors? How does the cause proceed after a transcript and assignment of errors are filed?

cause is heard and finally decided. This writ is called a *supersedeas*, and the party obtaining it is usually required to give security for the payment of such judgment as may be rendered against him, in the same manner as if he had taken an appeal. If a *supersedeas* is not issued, execution goes on in the inferior court as if no writ of error had been prosecuted; and if the judgment of the inferior court should in the end be reversed, a purchaser at a sale under the execution will hold the property sold, though the execution plaintiff may be compelled to pay the purchase-money to the defendant whose property it was.

When a cause is in a superior court for the correction of errors on an appeal, or on a writ of error, the issue between the parties is whether there is error or not—one asserting that there is error upon the record, and the other that there is no error. As soon as they are ready, it is usual to argue their respective points orally, or to submit their arguments in written or printed briefs; and if the court is of opinion that the inferior court made any erroneous decisions by which the party complaining was injured, the proceedings are reversed or set aside as far back as to the point where the first error was committed. The cause is then sent back to the court in which the erroneous decision was made, for a new trial. When it gets back to the inferior court, the parties commence anew from the point up to which all the proceedings were correct, and proceed to have the cause tried again in the same manner as before.

Judges of the courts which have what is called original

What is a *supersedeas*? What security is the party obtaining it required to give? What is the effect in the inferior court, if no *supersedeas* is granted? What is the issue between the parties in a court of errors? How is the issue submitted? What is done by the superior court if there are errors? What is done in the inferior court when the cause gets back there?

jurisdiction, or the power of trying causes in the first instance, are frequently obliged to decide points of law off-hand, and without time or opportunity for examination or reflection. It is, therefore, highly important, as these decisions may have a very important bearing on the rights and interests of the parties, that there should be some mode provided for the examination and correction of decisions thus hastily made. This mode is provided in the manner just pointed out, whereby, on appeals or writs of error—which latter are, indeed, only another species of appeals—the supreme courts or courts of errors of the United States and of the several states can, at their leisure, examine and decide such points as are contested.

Questions frequently arise upon the original trial of a cause the decisions upon which may be important, and which will not appear upon the record of the cause unless specially made a part of the record. This is done by what is called a *bill of exceptions*. If, for instance, during the progress of a cause, one of the parties applies for a continuance until the next term, and the court refuses it on the ground that the reasons given are insufficient, the party so refused may prepare a bill of exceptions setting out the application, the grounds of it, and the refusal of the court to grant it. So, if one party offers a certain person as a witness, and the other contends he is incompetent; or if testimony is admitted which the opposite party objects to as illegal; in these, and in a thousand other cases, the facts may be set out, with the decision of the court; and, when signed and sealed by the judges, the bill of exceptions is inserted in and becomes a part of the record of the cause. The law re-

Why are courts of errors necessary? What is the course adopted when decisions are made in the course of a trial which would not appear upon the record? How is a bill of exceptions made? Give some examples when one would be necessary.

quires that the judges who make any decision which is complained of or excepted to, shall sign and seal a true and correct statement thereof, in order that the exact state of the facts may be shown to a superior court, if the party complaining of the decision should think proper to appeal or prosecute a writ of error.

In this way, also, the decisions of the jury upon questions of fact are sometimes indirectly reviewed by the superior courts; for, as we have already seen, if the verdict of the jury is manifestly contrary to law and the evidence, the court may and should order a new trial upon a motion made for that purpose. Therefore, if the court refuses to grant a new trial in a case where one ought to be granted, that will be an erroneous decision, which the court of appeals or errors will reverse.

The question thus raised is presented in the court of appeals by a bill of exceptions, setting out all the evidence given on the trial, with the verdict, and the refusal of the court to grant a new trial. The question then arises whether, on such evidence, a new trial ought not to have been granted. It is a rule, however, in such cases, that as the jury is the proper tribunal to weigh and estimate the evidence, if there was any, however slight, from which the jury might reasonably have found as they did, their verdict will not be disturbed. But if it clearly appears that they must have made some mistake, or that there was no evidence from which they were authorized to find as they did, it will be determined that a new trial ought to have been granted. The judgment will then be set aside, and the cause remanded for that purpose.

How are the decisions of a jury indirectly reviewed? How is the question whether there should have been a new trial raised? By what rule, as to the weight of the evidence, will that question be decided in a court of errors?

CHAPTER LXV.

OF THE COSTS OF SUIT.

It has long been an established rule that in all suits the losing party, or the one against whom the final judgment is rendered, shall pay to the opposite party the costs incurred in their prosecution. If, therefore, the plaintiff is successful, the judgment, in addition to his debt or demand, includes the costs he has been at in carrying on his suit. If the defendant succeeds, he obtains a judgment for the amount of his costs. This is deemed reasonable and just, for if the plaintiff is obliged to resort to a suit for the purpose of obtaining his rights, he ought to be indemnified for his necessary expenses in doing so; and if a defendant be sued without just cause, he also should be reimbursed for the expenses thus wrongfully incurred.

In cases where both parties partially succeed, which sometimes happen—as where the parties have mutual demands against each other, and each succeeds in establishing a portion of such demands—the court usually apportions the costs in such manner as it deems right.

It may also happen that, during the progress of a cause, judgments for costs may be given, before its final determination, in favour of one or the other of the parties. Thus, if the plaintiff applies for a continuance and it is granted to him, it is usually granted at his costs; that is, upon condition that he will pay the defendant all the expenses

Who is entitled to costs in an action at law? Why are costs given? When both parties partially succeed, how are the costs adjusted? Give some instances where a judgment for costs is rendered before the final termination of the suit.

incurred by him in preparing for a trial at that time; and if he does not then pay them, the court will render a judgment in favour of the defendant for the proper amount. This judgment, which respects only the costs included in it, is final, and though the plaintiff should afterward succeed in his suit, he is obliged to pay or satisfy it.

These judgments for costs are rendered on the supposition that the parties have actually paid the costs as they were incurred; but, in this country, the officers of the courts very frequently issue writs and perform other services, without receiving payment at the time, and the judgments for costs are collected by those officers, who thus procure payment of their charges.

The expenses which are termed costs and recovered as such are the fees to which the officers of the court are entitled for the services rendered by them, together with a charge made for the payment of the jurors and witnesses, and sometimes a small sum due to the attorney of the winning party, called a docket-fee. The ordinary fees paid by a party to his attorney, or his expenses in attending court, are not considered a part of the costs.

The fees which the officers may legally charge are regulated by statute laws in the several states, as are also several particulars regarding the amount of costs which may be recovered in the various kinds of actions. In some cases, it is provided that when a party summons an unnecessary number of witnesses to prove a particular fact, the opposite party, if unsuccessful, shall only be obliged to pay the costs of a definite number. In some cases, also, it is provided, with the view of discouraging

What is the effect of such a judgment for costs? Upon what supposition are such judgments for costs sometimes rendered? What are the expenses which are included in the costs? What provisions do the statute laws contain on the subject of costs? As to witnesses? As to the amount of costs?

vexatious litigation in trifling causes, in which the costs sometimes exceed the sum demanded, that if the plaintiff recovers only a certain amount, as if, in an action for a trespass, he should recover only five dollars, he shall not recover more costs than damages.

When the United States or a state is a party, as in criminal prosecutions, no costs can be recovered against the government, though the latter may have judgment for costs against the other party.

In suits by and between citizens of the same state, neither party can, in general, require the other to give security for the costs; but when the plaintiff is a non-resident, the defendant may require him to give such security. When so required, the plaintiff gives a bond, executed by himself and some resident of the state, conditioned for the payment of such costs as may be adjudged against him. If he fails or refuses thus to secure the costs the suit will be dismissed. The reason for requiring security in such cases is, that, as non-residents of the state are without the jurisdiction of the state courts, a judgment for such costs as should be incurred by the opposite party could not be enforced by execution.

Against whom may costs be recovered when the government is a party? In what cases may a plaintiff be required to give security for costs? What is the consequence if security be not given? Why is such security required?

CHAPTER LXVI.

OF THE SATISFACTION OF JUDGMENTS.

WHEN a judgment has been obtained, it may be satisfied by a voluntary performance of the sentence by the defendant, or by means of a writ called an *execution*, which is issued to carry the judgment into effect or to enforce its satisfaction.

There are statute laws of the several states which provide that in most cases the defendant may have a *stay of execution* for a certain limited period, by giving security for the payment of the judgment within such period. This is done by the person who becomes security acknowledging himself bail for the payment of such judgment according to law, or at the time specified. The acknowledgment is taken in open court, or before the clerk in vacation, or by the sheriff after an execution has issued, as the particular state law may require. When bail has been so entered, it usually has the effect of a judgment against the security as well as the principal, and execution issues against both if the debt remains unpaid.

Sometimes disputes arise as to whether a judgment has or has not been satisfied. The proper mode of settling such disputes, is for the defendant who claims that the judgment has been satisfied, to make a motion, in the

How may a judgment be satisfied? What is meant by procuring a stay of execution? How is it done? Before whom is the acknowledgment taken? What effect has it as respects the bail? What is the proper method of settling disputes as to whether a judgment has been satisfied?

court by which it was rendered, to have an order for the entry of satisfaction on the record. Courts have always the power to regulate their own process; and, due notice having been given to the opposite party, if it is found that the debt has been paid or the judgment otherwise legally satisfied, it will be ordered that a note to that effect be made upon the record of the judgment, to prevent the issuing of an execution.

In some states, it is the practice in such cases for the defendant to file a petition in the same or in a superior court, setting out that since the rendition of the judgment something has occurred (stating the facts) which entitles him to have satisfaction entered on the record, and to be relieved from further oppression by the plaintiff. A writ then issues, called an *audita querela*, which recites that the *complaint* of the defendant had been *heard*, and requires the parties to appear with their allegations and proof, in order that justice may be done between them. This writ, however, is seldom used, as it is more convenient and less expensive to the parties to hear such cases and grant the requisite relief in a summary way upon motion.

If a judgment be not stayed, suspended, satisfied, or reversed, the plaintiff is entitled at any time, and as a matter of right, to request an execution to be issued. There is, however, this restriction—that, by the common law, if an execution is not issued within a year and a day, the judgment is said to be *dormant*, and a presumption arises that it has been paid or otherwise satisfied. By the laws of some of the states, this period has been lengthened to two, and, in some instances, to three years—commencing at the date of the rendition of the judg-

What is an *audita querela*? To what remedy is the plaintiff entitled if the judgment be not satisfied? When is a judgment said to be dormant?

ment, or from the expiration of the time for which it was stayed, if a stay of execution was entered. After the termination of this period, if none had been taken out in the mean time, an execution cannot be issued without the judgment being first revived. But if an execution be issued before the judgment becomes dormant, other executions may be issued successively until the debt be made; for the efforts thus made to collect it prevent any presumption of payment arising from the inactivity of the plaintiff.

To *revive a judgment*, it is necessary to procure a writ to be issued, called a writ of *scire facias*, calling upon the defendant to appear at the next term of the court, and *show cause* why the judgment should not be revived and execution had against him. The proceedings upon the return of this writ are similar to those where a new suit is commenced. The defendant may appear and plead any matter showing that the judgment has been legally satisfied; but if he does not appear, or does not make a sufficient defence, a judgment will be pronounced that the original judgment stand revived, and that the plaintiff have execution of it.

It is also necessary to revive a judgment by *scire facias* before an execution can issue, when the judgment defendant dies before an execution issues and is levied on his property, as it is deemed proper in such cases to afford the administrator or heirs an opportunity of showing, if they can, that an execution ought not to be issued. But if property is levied upon, and the judgment defendant dies before a sale is made, the judgment need not be

What is necessary to be done before execution is taken out on a dormant judgment? What are the steps to be taken to revive a judgment? What are the nature of the proceedings on the return of the *scire facias*? When does the death of the defendant render it necessary to revive a judgment?

revived. In that case, the officer proceeds to dispose of the property taken, in the same manner as if the defendant was still living.

Executions are of various kinds, according to the nature of the actions on which they are founded, and of the judgments had or recovered.

When the possession of land is awarded the plaintiff, as in an action of ejectment, an execution is issued, called a writ of *habere facias possessionem*, which commands the sheriff to give the plaintiff actual possession of the land recovered. In the service of such a writ the sheriff may, if it is necessary, take with him the *posse comitatus*, or power of the county, and take forcible possession of the land or tenements.

In other actions, where the judgment requires some special thing to be done, a special writ of execution issues, according to the nature of the case. Thus, if in an action of replevin the defendant procures a judgment for the return of the property, a writ issues to the sheriff commanding him to cause such a return to be made.

In actions where a sum of money is recovered, the executions commonly used in this country are of two kinds; namely, against the body, or against the property of the defendant.

How do executions vary? What kind of execution issues to give the plaintiff possession of land? How is it served? When some special thing is to be done, what is the nature of the execution? Give an example. What are the kinds of executions used for the recovery of money?

CHAPTER LXVII.

OF EXECUTIONS AGAINST THE BODY OF THE
DEFENDANT.

AN execution against the body of the defendant is called a *capias*, or *capias ad satisfaciendum*, to distinguish it from the *capias* used in the commencement of a suit, called a *capias ad respondendum*. The last-mentioned writ is to have the body of the defendant in court to answer the complaint of the plaintiff, while the *capias ad satisfaciendum*, as the words import, requires the sheriff to take his body in *satisfaction* of the judgment. The intent of it is to imprison the body of the debtor, until satisfaction be made for the debt, damages, and costs for which the judgment was rendered.

This is considered a writ of the highest nature, inasmuch as it deprives a man of his liberty; and though, in England and in some of the states of this Union, the law gives the creditor this harsh means of enforcing the payment of his dues, it requires him, when he resorts to it, to do so under certain conditions and restrictions. When the body of the debtor is thus taken, no other execution can be issued against his land or goods; and if the creditor voluntarily permits him to escape, the judgment is considered satisfied and paid by the imprisonment suffered. And this is the case, though the debtor is

What is the execution against the body called? How is it distinguished from the *capias* used at the beginning of a suit? What is its intent? What are the restrictions and conditions under which it must be resorted to? What is the consequence if the debtor is released?

released upon promises which he afterward refuses to perform.

This writ commands the sheriff to take the body of the defendant, and have him before the court to make the plaintiff satisfaction for his demand. If he does not make satisfaction when arrested, the debtor must remain in custody until he does. He is not in practice taken before the court, but is committed to jail, or confined in some place under the charge of the sheriff.

If, after being thus arrested, the debtor by any means procures a release from confinement, and is seen at large, it is an *escape*. If the sheriff voluntarily permits him to escape, he cannot retake him; but if it was without the consent of the plaintiff, the sheriff becomes liable for the debt. If the escape was not with the consent or permission of the sheriff, the latter may retake the debtor on fresh pursuit; and if he has him again in custody before any action is brought against himself, he will be excused. But if the prisoner is not retaken, even if he was rescued from the sheriff by force, the latter becomes liable, for he is bound to have sufficient force to keep the prisoner, and he may command the power of the county for that purpose.

In most of the states there are *insolvent laws*, under which a person taken on a *capias ad satisfaciendum* may procure his release by surrendering all his effects, except certain specified portions—such as wearing apparel, bedding for a family, &c.—to his creditors. When so released, though no execution can afterward issue against

What does the writ command the sheriff to do? What is done with the debtor? What is an escape? If the sheriff voluntarily permits an escape, what is the consequence? If the escape is not with the consent of the sheriff, what may the latter do? If the prisoner is not retaken, what is the consequence? How may a prisoner be released under the insolvent laws? What other executions can there be issued against him after such release?

his body for the same debt, an execution may issue against his property, should any be found.

Some of the states have also attempted to mitigate the rigour of imprisonment for debt, by establishing what are called *prison bounds*—as the boundaries of a certain town or county—within which persons imprisoned for debt may go at large. But if they on any occasion go without the limits so established, though they may immediately return, it is an escape, and the bond they are required to give to keep such bounds becomes forfeited.

Others of the states have abolished imprisonment for debt in all ordinary cases entirely; and in those states the *capias ad satisfaciendum* is never used except in some specified cases of fraud or official misconduct.

CHAPTER LXVIII.

OF EXECUTIONS AGAINST THE PROPERTY OF THE DEFENDANT.

THE most common species of execution used in this country is the *fi. fa.*, sometimes abbreviated *fi. fa.*, so called because it commands the sheriff to *cause to be made* the sum or debt recovered, from the property of the defendant.

What are prison bounds? What is the consequence of going out of the bounds? When is this *capias* used in those states that have abolished imprisonment for debt?

What is the most common species of execution used in this country called? Why is it so called?

The sheriff has no authority, in serving either this writ or the *capias*, to break open any outer doors; but if he can gain peaceable entry into a house, he may then break open any inner door in order to take the goods of the defendant.

The taking possession of property by virtue of an execution is called a *levy*; and to constitute a legal levy of personal property, the goods must be present, so that the officer can obtain actual possession of them. When so taken, they are in his custody; and he must keep them safely until he can advertise and sell them. If he loses them through negligence, or if, in consequence of any fault or want of care on his part, they are injured or destroyed, he cannot afterward levy on other property of the defendant, but will be himself responsible to the plaintiff.

There are certain articles of personal property which the laws of the several states exempt from execution, in order that the debtor may not be entirely deprived of the means of supporting himself or family. These are, usually, wearing apparel, implements of trade, or household goods, to a certain specified amount or value. All other personal property is subject to execution; and when a writ of *fieri facias* comes to an officer's hands, it is his duty to seek for and take it.

All such property is also bound by the execution from the time the writ comes into the officer's hands. Any transfer or sale of it, after that time, will not prevent its being levied upon; and if an officer neglects to make a

What power has an officer serving this writ to break open doors? What is the taking possession of property under an execution called? Where must the goods be? What must the officer do with them? If he loses them, or if they are injured or destroyed, what is the consequence? What personal property must the officer seek and levy upon? From what time is the personal property of the defendant bound by the execution?

levy when he might have made one, so that in consequence of such neglect all the property of the defendant is placed out of his reach or lost, so that the debt cannot be made, he will be liable to pay the debt to the plaintiff himself.

Usually, when property is levied upon, the statute laws permit the defendant to retain possession of it until the time of sale, upon his giving a bond, with security, for its delivery to the officer at the time and place of sale. In such cases, the sheriff is responsible for the sufficiency of the security, or at least that the person becoming the surety of the debtor was reputed to be solvent and able to pay the sum specified in the bond, at the time the bond was executed, if the condition should not be complied with.

The modes of advertising and selling are prescribed by the statute laws, the provisions of which must be strictly adhered to or the sale will be invalid. In some states, property is required to be sold for a certain appraised value.

In serving a writ of *fieri facias*, the sheriff should first request the defendant to deliver to him property for its satisfaction. If the defendant refuses to do so, the officer must then take such as he can find; and if the defendant claim that it is exempt from execution, and if it is of the species exempted by law, the officer should release to him until he has claimed all that the law gives him a right to retain, and then levy upon the remainder.

What effect has a sale or transfer of personal property after the writ comes into the officer's hands? What is the consequence if an officer neglects to levy when he might have done so, and the property is afterward lost, so that the debt cannot be made? How can the defendant procure the custody of the property until the time of sale? For what is the officer responsible in such cases? How are the modes of advertising and selling prescribed? What is the consequence of not pursuing those modes strictly? How should a writ of *fieri facias* be served?

By the common law, lands could not be alienated or sold for the debts of the owner—one of the leading feudal principles being that lands should not be encumbered, they being held on condition of service to the lord. As the feudal system declined, the restrictions on alienation were gradually worn away, and though lands were never placed on the footing of personal property in this respect, the profits were permitted to be sold. By virtue of a statute passed during the reign of Edward I., the plaintiff was permitted, at his election, either to take out a writ of *feri facias* or a writ of *elegit*, so called because it was sued out at the choice of the plaintiff, by which the defendant's goods and chattels were not sold, but only appraised and delivered to the plaintiff in part satisfaction of his debt. If these goods were insufficient to pay the debt, one-half of the land of the defendant was also delivered to the plaintiff, to be retained by him until the debt should be paid by the rents and profits, or until the defendant's interest therein should expire.

Statutes similar to this are in force in some of the states, but generally, in this country, lands are subject to execution equally with personal property; and the writ of *feri facias* issues against all the goods and chattels, and lands and tenements of the defendant.

An execution is always made returnable at some fixed period, as on the first day of the next term of the court, or at the end of three, six, or twelve months; and the space of time between its date and the period specified for its return is sometimes called the lifetime of the execution, or the time it has to run. On or before the day so fixed,

What was the common law as to the sale of land on execution? What is the nature of a writ of *elegit*? Against what property does the writ of *feri facias* usually issue in this country? At what time is an execution made returnable? What is the space of time between its date and its return day called?

the officer should deliver it to the clerk of the court, or the officer who should receive it, with an endorsement on it showing what he has done, which is called his return. After the proper return day, he cannot levy upon property under it, as the execution is said to be dead; though if he had levied during its lifetime, he may proceed to sell after the return day. But by so doing, though the sale would be valid, he may render himself liable to pay the debt due the plaintiff, if he does not make the debt from the property previously levied upon.

The proper course to be pursued, if the property levied upon be not sold before the return day, as for want of time to advertise, or for want of bidders on an offer of the property for sale, is to return the execution on the proper return day, with an endorsement to that effect. Another writ is then issued, called a *venditioni exponas*, which commands the officer to *expose to sale* the property so previously levied upon. Under this latter writ, the officer proceeds to dispose of the property exactly in the same manner as if the execution had not run out. It frequently happens that several writs of *venditioni exponas* are issued, as they successively expire without a sale being effected, before the property levied upon is finally disposed of.

If the officer having a writ of *feri facias* cannot find any property to levy upon, and is obliged to return it without a levy, or if the property levied upon does not

What should the officer do with the execution on the return day? What can he do with it after the return day? What is the consequence if he sells after the return day, and does not make the debt? What is the proper course to be pursued if property is levied on and not sold before the return day? What does a writ of *venditioni exponas* command the officer to do? How does the officer proceed under it? What is done if the property is not sold under that writ? If the officer cannot find sufficient property to satisfy a writ of *feri facias*, what other writs issue?

sell for a sufficient sum to pay the whole debt and costs of suit, other writs of the same kind may be issued successively until the judgment is fully satisfied.

At a sale under execution, the sheriff or other officer making it is regarded as the agent of both the plaintiff and defendant; of the plaintiff, to make and receive the amount of his debt, and of the defendant, to make sale of his property. He should, therefore, act in good faith, and diligently perform his duties to both parties. On the one hand, he should grant no unreasonable indulgence to the defendant, whereby the recovery of the debt may be endangered, and on the other, he should endeavour to sell the property levied upon to the best advantage. He should not sacrifice it for a grossly inadequate price, and should suffer no fraudulent interference by others to injure the sale. If he should act improperly in these respects, the sale will be void, and he may render himself liable for any injury sustained by either party.

In making the sale, the officer is regarded as standing in the place of the execution defendant, the judgment and execution giving him similar authority to make the sale as would be given by a power of attorney; and his conveyance pursuant to the sale carries the same title possessed by the execution defendant, and no greater or less.

The execution should be of a kind authorized by law, and should issue upon a valid judgment, or it will be entirely void, and a sale under it will be of no effect. But when mistakes are made in issuing an execution—as if it be wrongly dated, or the amount of the judgment is not

Whose agent is the officer making a sale under execution? How should he perform his duties to both parties? What are the consequences if he should act improperly? What title does the conveyance of the officer carry? Of what kind should the execution be, to render the sale valid? What is the effect of mistakes made in issuing an execution?

correctly specified, or if it be made returnable at a wrong time—it is said to be *erroneous* merely, and not void. In such cases, upon an application by motion, the court would either have the errors corrected or order the execution to be set aside; but if no such application be made, the proceedings under it will be valid, and, as in the case of judgments, they cannot be questioned collaterally, or in any other suit or proceedings not instituted for the express purpose of having such errors corrected.

CHAPTER LXIX.

OF PROCEEDINGS IN CHANCERY.

IN some of the states of the Union there are distinct courts established for hearing and deciding suits in chancery, but this is not generally the case. Usually, all the courts of the United States and those of the several states in which the distinction is still retained, except the courts of inferior magistrates, are courts of chancery as well as courts of law. That is, they have jurisdiction to hear and decide all cases either at law or in chancery; and they sit as courts of chancery whenever a suit in chancery is to be tried. When they do sit as courts of chancery, however, the judges are styled chancellors, and all the forms and modes of proceeding peculiar to chancery courts are adopted.

How are mistakes in issuing an execution to be corrected? If no proceedings are instituted to have them corrected, can they be objected to?

What courts are there in this country that are courts of chancery?

In Pennsylvania, the distinction between the two systems of law and equity never did exist, but the rules and principles of equity were administered in ordinary suits at law. This distinction has also been abolished in several of the states which have recently adopted new constitutions, and provision is made that all the matters that formerly constituted the subjects of chancery jurisdiction shall be brought in the same courts and be tried in the same manner as other suits.

Properly speaking, the rules and principles of equity, as they have been gradually developed in granting relief from unforeseen consequences, or in moderating the rigour of the strict rules of law, are but modifications or qualifications of those rules; and, in this respect, it is not easy to perceive any essential difference between such qualifications and those which have been made by the courts of common law. In either case, the result is the limitation of an old law or the establishment of a new one, and may be as readily known and understood under one form as the other.

The strongest reason for preserving the old forms of chancery proceedings, or for continuing the difference in the nature of the proceedings in suits at law and in chancery, is, that the modes of procedure adopted in each system are well adapted for those cases that come within its jurisdiction, but not for those that come within the jurisdiction of the other.

It has been shown, in the previous chapters, that the great object of the preliminary proceedings in suits at

How has the distinction between the systems of law and chancery been abolished in some of the states? What difference is there in the modifications and qualifications of the laws that have been made by the courts of chancery and the courts of law? What is the strongest reason for continuing the difference in the nature of the proceedings in suits at law and in chancery?

common law is to so shape the pleadings that all questions of law shall be presented to the judges, and all questions of fact be narrowed down to those points only which are controverted by the parties, and then submitted to the jury in the form of issues—presenting those points singly for determination. This system is, doubtless, admirably calculated to insure a fair and just result in all cases that can be thus simplified, or that can be so arranged that single questions of fact can be determined by a jury, while the judges determine the law; but there are cases in which there are so many parties concerned, and so many conflicting or tangled interests, that this would be impossible.

In courts of chancery, the civil-law modes of procedure are adopted. Questions of fact as well as of law are submitted to the judges. The parties are not compelled to rely upon what they can prove by witnesses, but may interrogate each other; and they may set out in their pleadings not only the facts upon which they intend to rely, but the evidence by which such facts are to be proved.

It is, probably, because these modes of procedure afford greater latitude to the parties, and are more flexible in their administration, that courts of chancery have gradually acquired jurisdiction of all or almost all those matters of dispute that could not be conveniently tried in the courts of law. In other words, the courts of chancery afford remedies in all those cases for which none of the various forms of action known in common-law proceedings are suitable; and the modes of procedure in these courts are borrowed from the civil law, because by those modes they are not restricted within such narrow limits, but may vary or alter their forms, so as to afford the appropriate

How may cases arise to which the system of common-law procedure is not well adapted? What modes of procedure are adopted in the courts of chancery? Why were these modes adopted?

relief for every injury which cannot be fully redressed otherwise.

Whether it will be found beneficial to amalgamate the two systems, for the purpose of securing uniformity in suits, or whether the requiring the courts of law to administer the laws of equity will not compel those courts so to alter their modes of procedure, when the laws of equity are to be applied, that the change will, after all, be one of form rather than of substance, are questions that experience only can determine.

The essential difference between proceedings at law and in chancery consists chiefly in the different modes by which a just result is sought to be attained. The courts of law and of chancery are equally governed by the laws of the country, and neither can render a judgment contrary to the laws; but they differ in the practice adopted as to the mode of proof, the mode of trial, and the mode of granting relief. If the ordinary courts of law are obliged to resort to the modes of proof, trial, and relief adopted by the courts of chancery, in order to afford the necessary remedies in such cases as are cognizable in the latter courts, they will still be courts of chancery in hearing such cases, though they may not be so called.

In what does the essential difference between proceedings at law and in chancery consist? Can a judgment contrary to the laws of the country be rendered by either?

CHAPTER LXX.

OF THE SUBJECTS OF CHANCERY JURISDICTION.

THE great object in establishing courts of chancery being to supply the defects in the courts of law, and to afford remedies when remedies are required but cannot be afforded by the more simple and inflexible practice of those courts—the subjects of chancery jurisdiction are those matters in which the courts of law do not furnish an adequate remedy.

Such matters may be either those in which the court of chancery merely acts as an assistant to a court of law, by removing some impediment to or providing some security for the final decision of a suit in the latter court, so as to do equal justice to both parties; or they may be such as are originally brought in the court of chancery, and in which all the rights of the parties are there determined.

Among the class of cases first above mentioned are proceedings to compel a discovery, or obtain evidence to be used on a trial in a court of law; or to preserve testimony that is in danger of being lost, so that it can be used when required. So, also, proceedings are frequently instituted to provide for the safety of property in dispute, until the litigation can be determined, or to prevent such property from being dissipated or destroyed by those having a partial but not exclusive right to it.

What are the matters of which courts of chancery take jurisdiction? Mention some of the cases in which those courts act as assistants to the courts of law.

The subjects of which courts of chancery take original and entire jurisdiction are usually comprised under these heads : namely, frauds, mistakes, accidents, accounts, the specific enforcement of agreements, and controversies to which persons labouring under some disability or infirmity are parties.

Under the head of *fraud* are included all those cases in which one party has obtained some undue advantage over another by fraudulent means. Thus, if one person should obtain the signature of another to a deed or other instrument of writing by some trick or deception, or should induce another to enter into a contract by false and fraudulent representations, a court of chancery has power to cancel or annul such instrument or agreement.

A common case that courts of chancery take jurisdiction of under the head of frauds, is where one person fraudulently sells his property to another, or makes a pretended sale, for the purpose of preventing his creditors from subjecting it to the payment of their demands. Upon such a case being made out, these courts will decree the sale to be void, and either order it to be sold for the payment of the just debts of the owner, or simply cancel the fraudulent deed, so that there may be no impediment in the way of its sale for that purpose by the ordinary process of law.

An instance of the kind of case that is relievab^{le} under the head of *mistakes*, occurs when an instrument in writing has been so drawn up that, by mistake, the subject of some agreement is misdescribed, or the terms agreed upon by the parties erroneously stated. Here, while in a suit

What are the heads under which the subjects whereof those courts take original jurisdiction are comprised? Give an example of the cases comprised under the head of "fraud." What will be done where a person fraudulently sells his property? Give an instance of the kind of case that is relievab^{le} under the head of "mistakes."

at law, according to a rule mentioned in a former chapter, the parties would not be at liberty to prove an agreement different from that written down, a court of chancery, upon proceedings for that purpose, will alter, amend, or entirely cancel such instrument, so that no improper or inequitable use can be made of it.

Under the head of *accidents*, individuals are relievable from such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct of the party who suffers from them. Thus, if one should lose the title-deeds to his lands by fire or other casualty, the courts will order the persons who executed the lost deeds to make others, or appoint commissioners to do so, or render a decree that shall operate as a deed.

There are many cases of *accounts*, or mutual debts and charges, in which the ordinary courts of law cannot do full justice to the parties. Such, for instance, are those where the accounts are of long standing and great variety, and would be calculated to give rise to a multiplicity of suits; or, when the truth is known only to one of the parties, from his standing in some relation of trust and confidence, and the other party cannot obtain the necessary evidence without drawing upon the conscience of the party to whom it is known; or, when the parties stand in such relation that one cannot sue the other in a common action at law for an item of account, as in the case of partners. In these and many similar cases, courts of chancery will cause all the necessary inquiries to be made by an examination of the parties under oath, the testimony of other persons, the inspection of books, documents, and vouchers, and render such a decree as will do justice to all the parties concerned.

Give an instance of the kind of case that is relievable under the head of "accidents." Mention some cases of accounts which are settled in chancery.

In cases of contracts, one party can sue the other in a common action at law for the breach of his engagements, and obtain compensation in damages for such breach; but this would often be a very inadequate remedy. If, for instance, one should contract to sell another a house or farm, receiving a portion of the purchase-money in hand, and agreeing to make a deed upon the payment of the balance, and the purchaser, relying on the agreement, should incur great expense or labour in the improvement of the premises—should the vendor afterward refuse to perform his agreement, such damages as the vendee could recover in money might be a very inadequate compensation. A court of chancery will, therefore, in such cases, compel the vendor to perform his contract specifically; that is, to do the precise thing he agreed to do. If he agreed to make a deed upon the performance of certain conditions, and those conditions have been performed or offered to be performed, the court will order him to do so; and if he refuses, some other person will be appointed to make one, that will have the same force and effect.

Courts of chancery give relief for and against persons who are under some legal disabilities, in many cases. They take cognizance of suits by married women against their husbands for a maintenance; and, sometimes, of suits by strangers against married women, notwithstanding their coverture. They will also grant divorces when necessary. They will take charge of the estates of infants or minors; and they will sometimes require such minors to pay debts or perform contracts, notwithstanding their minority, when justice requires that they should do so.

How will courts of chancery compel the performance of contracts? Give some instances where they will give relief for or against persons under some legal disability.

It has been mentioned, in a former chapter, that these courts have assumed to give a construction to mortgages, or securities for money lent, in consequence of the unconscionable advantages that would be frequently taken of the debtors if the terms of such agreements were strictly enforced. It is, therefore, in chancery that proceedings are had for the redemption and foreclosure of such instruments.

CHAPTER LXXI.

OF THE PLEADINGS AND PRACTICE IN SUITS IN CHANCERY.

A SUIT in chancery is commenced by drawing up a statement of the matters complained of, which is called a bill of complaint. It is addressed to the judge or judges of the proper court, and usually is commenced with these words: "Your orator, A. B., humbly complaining, states," &c. The word "orator" signifies a person making a prayer. Except in the bill of complaint, the person who institutes the suit is usually called the *plaintiff* or *complainant*.

Every bill of complaint must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; as some fraud, trust, accident, or other matter for which relief can be afforded in chancery. The circumstances of the case are set forth at length, together

In what courts are proceedings instituted for the redemption and foreclosure of mortgages?

How is a suit in chancery commenced? What does the word "orator" signify? How is the person who institutes the suit styled?

with such deeds, documents, or other evidence as may be deemed material. In consideration of the facts thus stated, and because the orator or complainant is without relief at common law, he prays for such relief at the hands of the chancellor as will meet the nature of his case; and also for the process of the court to compel the defendant to appear and answer upon his oath to all the matters thus charged.

The bill must call upon all persons who are concerned in interest, however remotely, to appear before the court and become parties to the suit, for, otherwise, they will not be bound by any decree that is rendered. Besides, if one who ought to be present to enable the court to ascertain and settle the rights of all concerned is omitted, to be made a party, no decree will be rendered; and the bill will be for that reason dismissed.

The bill of complaint is signed by the attorneys or counsellors of the complainant, who, when practising in the courts of chancery, are usually styled solicitors; and it is filed in the office of the clerk of the court in which the suit is brought, at such a period as will afford time for the service of a subpoena upon the defendants to require them to appear at the next term.

If, when the court is in session, it appears that a subpoena has been duly served, within the requisite time before the commencement of the term, and the defendants do not appear, they may be called, as in suits at law, and a decision made in their absence. In this case, an order is made that the matters stated in the bill be taken as confessed to be true by the default of the defendants.

What does a bill of complaint contain? What does it pray for? Upon what persons must the bill call? What is the consequence if there are persons interested who are not made parties? How is the bill signed? Where and when is it filed? How are the defendants notified? If they do not appear when the court is in session, what is done?

They having had the requisite notice of the pendency of the suit, it will be presumed they would have appeared and contested the truth of the facts alleged if they could have done so.

There are usually statutory provisions by which the requisite notice can be given by publication in some newspaper, when the defendants, or some of them, do not reside within the jurisdiction of the court, and, consequently, a subpoena cannot be served upon them. In such cases, upon proof of the publication of the notice, the same consequences follow from a default as when the notice has been given by a subpoena.

If, however, the complainant cannot accomplish the object sought by him, without the actual appearance of the defendants—as where he desires to obtain evidence by means of their answers to his interrogatories—the non-appearance of such defendants, they having been duly subpoenaed, may be regarded as a contempt of the court; and a writ of attachment will be issued, commanding the sheriff to take or attach the defendants whose answers are required, and bring them into court forthwith.

When the defendants appear, as the bill calls upon them to answer the several charges it contains, they must do so, unless they conceive that the facts charged do not constitute sufficient grounds for proceedings against them. In the latter case they may *demur*, as in suits at law, and thus call upon the court to decide immediately whether, admitting all the facts alleged in the bill to be true, the complainant is entitled to any relief.

When the defendants do not reside within the jurisdiction of the court, how are they notified? In that case, what are the consequences of a default? If the complainant requires the actual appearance of the defendants, how is it enforced? When the defendants appear, what must they do?

If the decision upon a demurrer is for the defendant, the complainant may be permitted to amend his bill in such manner as to make it sufficient, if he can; but if he cannot, the suit is at an end, and the bill will be dismissed. If the demurrer is overruled, or if the defendants do not put in a demurrer in the first instance, they must plead or answer.

A *plea* is intended to prevent any further proceeding, by interposing, as a bar, some point founded on matter stated in the plea; as that the complainant can demand no relief by reason of an act of the legislature, a release, or a former decree. Of course, the defendant is bound to prove the truth of his plea, if put upon it by the complainant.

An *answer* is the most usual defence made to a bill of complaint. The defendants may answer jointly or separately, according to the nature of the case, or the replies that may be called for from each. An answer must either deny or admit all the material facts charged in the bill, or admit some of them and deny the others; or it may admit the facts, or some of them, and state such additional facts as will justify or palliate them. It must be sworn to by the defendant or defendants making it, unless the oath is dispensed with by the complainant.

As bills are often of a complicated nature, and contain various matters, a defendant may demur as to part, plead to another part, and answer as to the residue; and as there may be several defendants, each interested in a different manner or degree from the others, they may

If the decision upon a demurrer is for the defendants, what is the consequence? If the demurrer is overruled what must the defendants do? What is the intention of a plea? How may the defendants answer? What must the answer admit or deny? When must it be sworn to? How may the defendants reply to different parts of the bill, and separate from each other in their pleadings?

severally demur, plead, or answer, without reference to the particular kind of defence adopted by their co-defendants.

If a defendant omits either to admit or deny any material fact charged in the bill, or endeavours to evade a direct reply, the complainant may file *exceptions* to his answer, pointing out wherein it is deficient. Upon this being done, the court will make an order requiring him to answer fully; and if he does not, the facts charged, which thus remain unanswered, will be taken as confessed or admitted to be true.

When the complainant finds sufficient matter admitted or confessed in the defendant's answer, he may have the cause submitted for decision upon the bill and answer only; but in that case, the answer is taken to be true in every point.

When any material facts charged in the bill are denied by the answers, or by any one answer, or they are justified by any new facts alleged in an answer, the complainant files a *replication*, in which he avers his bill to be true, certain, and sufficient, and the defendant's answer to be untrue and insufficient; and this he asserts his readiness to prove. The defendant *rejoins*, averring the like on his side; and thus issue is joined upon the facts in dispute.

It sometimes happens that a defendant has occasion to pray for some relief against the complainant, or for some disclosures on his part; or to bring into court some new party, to co-operate in the defence, or who is in some way connected with the matters in dispute. This he does by

If a defendant omits to answer, or evades an answer to any fact charged, how can he be compelled to answer it? When is a cause submitted for decision upon the bill and answers only? When any material facts charged in the bill are denied, how do the parties make an issue?

filing, in addition to his answer, a bill of his own, which is called a *cross-bill*. To such a cross-bill, the plaintiff, and the other parties who are thus brought in, must demur, plead, or answer, in the same manner that the defendants to the complainant's original bill are required to do.

For the purposes of the cross-bill, the defendant becomes a complainant, and the parties answering it defendants. The filing it is, in effect, the institution of a cross-suit, which need not, necessarily, be heard and determined at the same time with the original suit, though it commonly is.

When the parties have, by these means, respectively asserted and denied such facts as are material to a proper decision, the cause is usually continued to another term of the court, in order to give time to each to make proof of the facts denied by the other. This is done by taking the depositions of witnesses, to be read when the cause is heard.

When all the witnesses are examined and their depositions sent to the court, either party may, at the next term, procure an order for their publication, after which they are open for inspection, and the cause is said to be ripe for its submission. Usually, at this stage of the proceedings, a day is appointed to hear the parties, which is called setting the cause "down for a hearing;" and it is then submitted and argued in the same manner as suits at law. Oral testimony and juries are, however, dispensed with, except in some peculiar cases.

What is the nature of a cross-bill? When are the matters alleged in a cross-bill heard and determined? How and when is proof taken? When is the cause ripe for its submission? How is it submitted and heard?

CHAPTER LXXII.

OF THE DECREES IN CHANCERY.

WHEN all the parties have been heard, and the questions presented in the manner before stated have been sufficiently examined, the court pronounces a decree, prescribing what shall be done in the premises.

The *decree* is not, like a judgment in a suit at law, simply a decision in favour of one party or the other; but, as the objects of suits in chancery are very various, the decrees are required to be so shaped as to give the proper relief under the particular circumstances developed, and to adjust every point in dispute according to equity and good conscience. If it is for the defendant, indeed, the bill is simply dismissed; but if it is decided that the plaintiff is entitled to relief, it is frequently necessary to prescribe specifically what each party shall do and perform, and to affix a variety of terms or conditions to be complied with by one or more of the parties.

If a party refuses to do any act which the decree requires him to do, his refusal is a contempt of the court, and he may be attached and imprisoned until his obedience is enforced. In many instances, however, the refusal of a party to do what is required of him is of little consequence, as the court will appoint a commissioner, or some officer, to act for him, and such act will be as valid and effectual as if done by the party himself.

What is a decree? How does a decree differ from a judgment in a suit at law? How is a decree enforced, if a party refuses to do any act which he is required to do?

The decree of a court of chancery has, in general, the same force and effect as a judgment at law. If it is for the payment of money, it binds the property of the defendants in the same manner and to the same extent. If it is for the sale of certain property, the sale is made by the sheriff, or by a commissioner appointed for the purpose, by virtue of a writ of execution issued to carry the decree into effect.

But besides *final decrees*, or those made at the conclusion of a suit and intended to put an end to it, these courts are often called upon to render decrees, or to make orders in the nature of decrees, at various stages in the progress of a cause, and upon some question or matter which does not complete the suit, or which are only intended to operate temporarily. These are similar to the interlocutory judgments of courts of law, mentioned in a former chapter.

It frequently happens that the principal object of a suit is to prevent some threatened injury, or to secure protection for some right of the plaintiff, and that for this purpose it is necessary that the defendant should be immediately restrained from doing some act by which the injury would be effected before the controversy between the parties could be heard and determined. It is in these cases that the *injunction*, one of the most effectual and important remedies of a court of chancery, is made use of.

As such cases often occur suddenly, when it is necessary that the arm of the law should be promptly interposed, an injunction may be granted by the court, or even by the judges, in the vacation of the court, at any time

What is the general force and effect of a decree? What kinds of decrees besides final decrees do courts of chancery make? When is an injunction made use of? At what times may an injunction be granted?

after a bill of complaint showing its necessity has been filed.

An injunction is carried into effect by the service of a copy of the order granting it, or of a writ issued pursuant to such order, on the persons to be restrained; and it is enforced by attachment and imprisonment if necessary. By the terms of the order, the defendants are required to do some particular act, or are enjoined and prohibited from doing some act which is contrary to justice and equity.

One of the common cases in which an injunction is granted, is where it is designed to stop or enjoin the proceedings in actions at law, when by accident, mistake, fraud, or otherwise, one party has obtained such an undue advantage over the other that a continuation of the proceedings would make the court of law an instrument of injustice. In such cases an injunction may be granted by a court of chancery to stay or stop the proceedings in the court of law, at any stage of their progress. The injunction may operate to stay the trial, or, after trial, the judgment, or, after judgment, the execution, or, after execution, to stay the money in the hands of the sheriff.

Another class of cases in which injunctions are frequently called for is composed of those in which one party, having a right to the present possession of certain property, is committing or is about to commit some waste or injury thereto, to the damage of another party, who has some right to the property to take effect after the right of the person in present possession has expired. Such a case sometimes arises between a tenant and landlord, or between one having a life estate in land and the

How is an injunction carried into effect and enforced? When will an injunction be granted to stay proceedings in an action at law? At what stage of the proceedings may the injunction operate? When will an injunction be granted to restrain a person from committing waste?

person having the remainder. If the person having possession should destroy the buildings, fences, or firewood, to the injury of him having the remainder of the estate, the latter could not enter and prevent the injury, because he would have no legal right to take possession of the premises until the estate held by the occupant expired. But as it would be manifestly wrong to permit one thus to take advantage of his temporary right of possession to destroy the whole property, so that he who is to come after him could enjoy no benefit from it—a court of chancery will interfere in this way, to prevent him from doing so.

Before an injunction will be granted, the plaintiff is required to give a bond, with security, to indemnify the defendant for any losses or damages he may sustain, should it ultimately appear that the plaintiff instituted the proceedings without sufficient cause.

As an injunction is always intended to meet the exigencies of the particular case, it will, of course, be so framed as to give the relief required, without extending the restraint upon the defendant any further than is actually necessary. The court will also impose upon the plaintiff such terms or conditions as may be deemed necessary to secure the rights of all the parties.

When an injunction is granted at the commencement of a cause, or during its progress, the restraint continues until some further order is made. The defendant may, at any time when the court is in session, move for an order to remove the restraint, or, as it is technically called, to *dissolve* the injunction. An order of this kind will be made, if it appears that the facts stated in the bill of

Why is an injunction necessary in that case? What security will be required of the plaintiff? What conditions will there be imposed upon him? How long does the restraint continue? What is the technical word used when the restraint is removed?

complaint, supposing them to be true, would not authorize the continuance of the injunction, or upon an answer being filed by the defendant, denying under oath the truth of the facts so stated. If not previously disposed of, when the whole cause is terminated by a final decree, the injunction is either dissolved, and the restraint upon the defendant thus removed, or it is decreed to *be perpetual*, in which case the defendant is for ever prohibited from doing the acts specified.

A final decree rendered in a suit in chancery is binding on all the parties, in the same manner and to the same extent as the judgment of a court of law; and appeals and writs of error may be taken to a superior court under the same regulations.

CHAPTER LXXIII.

OF THE CRIMINAL LAWS IN GENERAL.

IN the preceding chapters it will have been perceived that the laws secure to every individual the means whereby he may obtain the restoration of any right injuriously withheld from him by another, or a compensation for the infringement or privation of a right to which he was entitled.

Every infringement of the rights of another is, indeed, a violation of law, for which the offender ought to be com-

For what reasons will an injunction be dissolved? If not previously disposed of, what is done with the injunction when the suit is finally terminated? To what extent is a final decree in chancery binding on the parties? How may it be appealed from?

pelled to make retribution to the individual who is injured ; but there are some violations of law which are deemed offences not only against the person or property of the party who is the immediate sufferer, but against the community, or whole body of society. These are such as are deemed dangerous to the peace and security of society in general ; wherefore it is necessary that the state or government should provide means for their prevention and punishment

The necessity of laws prohibiting the commission of certain acts, under pain of incurring punishment at the hands of the community, is so obvious that all nations have admitted and practised upon it. It is unfortunately the case, that in all communities there are individuals who, from depravity of disposition or the indulgence of unrestrained passions, will be ready to commit acts of fraud or violence, unless restrained by the strong arm of the civil authority.

The only effectual means of preventing such criminal acts, by law, that has yet been discovered, is the deprivation of the offender of those natural rights of life, liberty, and the enjoyment of property, which, as has been stated in a former chapter, cannot be taken from any individual except under such circumstances as he has himself agreed shall justify their forfeiture. In this country, the consent of every individual to incur such penalties as the laws affix to the commission of a crime is to be found in the laws themselves, which only exist by and with the consent and approbation of the people.

As punishments of this nature are, however, the greatest and the most to be deprecated of any that can possibly be inflicted by human authority, there is the greater

Why are penal laws prohibiting the commission of certain acts necessary? What are the means of preventing the commission of criminal acts, by law?

necessity that they should be administered with care and circumspection. This the laws endeavour to secure, by various provisions intended to prevent the innocent from being confounded with the guilty, and to so temper justice with mercy that even the guilty shall be humanely dealt with, and subjected to no greater punishments than are absolutely necessary to accomplish the end designed.

The humane maxim, that it is better ten guilty persons should escape than one innocent person should suffer unjustly, is fully recognised. No one can be convicted but upon such proof that no reasonable doubt can be entertained of his guilt, and all the necessary means are afforded him for making a defence. He cannot be arrested, imprisoned, or tried, arbitrarily, by any judge or magistrate; but, in every step taken for such purposes, the forms of the laws must be strictly followed. Neither can he be convicted, except by a jury of his own state or county, unless he should voluntarily choose to waive his right to a trial by jury.

The aim or object of the laws which inflict penalties for criminal offences is not revenge, or expiation for the crimes committed, but the prevention of future offences of a similar kind. This may be effected by the amendment of the offender himself, the deterring others by the dread of the example made in his case, and by depriving him of the power of doing mischief in future. One or more of these purposes are had in view in all our criminal laws.

Policy as well as humanity requires that punishments should be so graduated that they should be, as nearly as

How do the laws endeavour to provide that punishments shall be administered with care and circumspection? How are innocent persons protected against unjust accusations? What is the aim or object of the laws which inflict penalties for criminal offences? How is that object to be effected?

possible, proportionate to the different kinds of offences they are intended to prevent. Without this graduation, the laws would be subject to the imputation of cruelty in the punishment of offences of a comparatively slight degree of criminality in a very harsh manner, while a knowledge by the offender that he had already incurred all the punishment the law could inflict would sometimes induce him to commit a greater crime with the view of preventing the discovery of a lesser one.

Several provisions in the constitutions of the United States and of the several states, designed to protect the innocent, to prohibit cruel and unusual punishments, and to secure a fair and impartial trial for all persons charged with the commission of crimes, have already been mentioned. There now remain to be noticed such other of the laws of this country relating to it as will suffice to give the student a general knowledge of this important branch of jurisprudence.

These laws proceed to classify and name the various criminal offences according to their nature and magnitude, to define clearly and specifically what acts shall constitute each such offence, and to prescribe the punishment or penalties to be incurred thereby. This is done chiefly by the statute laws. The acts of Congress provide for the punishment of offences committed against the United States in their federal capacity; and the acts of the legislatures of the several states, of such as are committed in violation of the state laws.

In some states, no acts are criminal but such as are expressly made so by the statute laws. In other states, persons may be prosecuted for acts that are criminal by the common law, though such acts are not expressly pro-

How should punishments be graduated? By what laws are criminal offences classified and defined? Are the acts made criminal by the common law criminal acts in this country?

hibited by the statutes. In all the states, the common-law definitions of crimes have been adopted and copied into the statutes, though, in some instances, the statutes have been extended to embrace cases which would not have been included in those definitions, and the punishments prescribed have been materially changed.

In general, all the criminal offences defined by the common law, as well those of an aggravated or atrocious nature as those of a less degree of criminality, but which it has been found necessary to prohibit and punish, in order to restrain mankind within those bounds which the security of society requires, are crimes in this country, either by force of that law or of the statutes of Congress or the state legislatures. There is, however, a class of minor offences, consisting of acts or omissions not essentially or naturally evil in themselves, but which are made criminal merely for the enforcement of certain municipal regulations, that are wholly the creatures of statutory enactments, which vary in the different states and within the boundaries of the different municipal corporations. These it will be impossible to enumerate in the following chapters. It will be necessary to resort to an examination of the statute laws to ascertain what acts of this description are made criminal in any particular state or locality.

By force of what laws are the criminal offences defined by the common law, crimes in this country?

CHAPTER LXXIV.

OF CRIMINAL OFFENCES IN GENERAL, AND BY WHOM
THEY MAY BE COMMITTED.

A CRIMINAL offence is an act done or omitted in violation of the laws of the country, forbidding the act committed, or commanding that omitted, and declaring such act or omission criminal.

All such acts or omissions are called *crimes*, or *misdemeanours*. Properly speaking, indeed, the words “crimes” and “misdemeanours” do not differ in legal signification, though, by common usage, one is understood to denote an offence of a serious or atrocious nature, and the other some fault or omission of less consequence.

In England, every species of crime which occasioned, at common law, the forfeiture of the lands or the goods of the offender, were called *felonies*. This most frequently happened when offences were committed for which capital punishment was liable to be inflicted—the forfeiture of the lands or of the goods and chattels of the criminal being almost always superadded in such cases. Hence, the idea of felony became generally connected with that of capital punishment. In this country, the term “felony” is often used in connection with crimes that were so denominated by the common law, though the penalties in-

Give the definition of a criminal offence. What is the difference, in legal signification, between the words “crimes” and “misdemeanours?” What are the species of crimes that were called felonies in England? Why did the idea of felony become connected with that of capital punishment? How is term felony used in this country?

flicted may be entirely different, and involve neither capital punishment nor forfeiture of property.

The term *misdemeanour* is, with us, generally used to denote offences of a less aggravated character than felonies or crimes deemed infamous, and which are not punished by death or imprisonment at hard labour, but only by fine and imprisonment, or by a fine only.

To constitute a crime cognizable by human laws there must not only be an *act done*, but also a *will* or *intention* on the part of the person by whom it is done. The mere design to commit a criminal act, if never carried into effect, though morally, perhaps, almost as culpable as the commission of the act itself, cannot safely be punished by temporal tribunals. The attempt, by such tribunals, to search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, has always led to the most monstrous oppressions and injustice.

Neither will the laws hold any one responsible for a mere act, if done without any will or intention. Consequently, *infants* of very tender years, *idiots*, and *lunatics* are not subject to criminal punishment. Even if one in his sound mind commits a crime, and before trial becomes insane, he cannot be tried, for he could make no defence. Nor, if after his trial he should become insane, could any further proceedings be had, for the laws will not punish one who is incapable of comprehending the cause or the object of the penalty to be exacted. But if a man should voluntarily put himself into a state of temporary madness

What are misdemeanours? How must an act and an intention be combined, to make a crime cognizable by the laws? What classes of persons are there that are not subject to criminal punishment? Can one, who in his sound mind commits a crime and afterward becomes insane, be punished? If one puts himself into a state of frenzy, for the purpose of stimulating himself to the commission of a crime, will he be excusable?

or frenzy, for the purpose of stimulating himself to the commission of a crime, this would not be permitted to afford him any excuse.

There are some other cases in which there is such a deficiency of will or design as will excuse the commission of an unlawful act. One of these is when the act is committed by *misfortune* or *chance*, and not by design. But if one be doing any thing which is in itself criminal, and a consequence ensues which he did not foresee or intend, as the death of a man, there are many instances in which his want of foresight would be no excuse, for he would be held criminally guilty of whatever consequence should follow his first criminal act.

Another case of this kind is when one, intending to do a lawful act, does one that is unlawful, from *ignorance* or *mistake*. But the mistake must be one of *fact*, and not an error or mistaken opinion as to the *law*, for ignorance of the law is no excuse. All persons must inform themselves what acts are criminal, at their peril. Thus, if one, intending to kill an assassin against whom he was defending himself, should, by mistake, kill a bystander, or one of his own friends, this would not be a criminal action; but if a man should imagine he had a right to kill another for doing some act, and should kill him, he would be guilty of murder, for he could not say he was ignorant that the law gave him no right to take the life of the person slain under such circumstances.

A *wife* is not responsible for some crimes committed in company with and by the command or coercion of her husband, as she is then considered as acting by compul-

When will a person be held responsible for the consequences of an act done by misfortune or chance? In what cases will an unlawful act done through ignorance or by mistake be excusable? Give an example. Is a wife responsible for crimes committed by the command of her husband? In what classes of crimes is she held responsible?

sion, and not of her own will. But this rule does not prevail in the cases of treason and murder, for these are considered such heinous crimes that the husband's coercion should not excuse them. Nor, indeed, is it applicable in those lesser offences generally classed under the head of misdemeanours, when slight punishments only are inflicted.

CHAPTER LXXV.

OF PRINCIPALS AND ACCESSORIES.

IN the commission of many crimes there may be one or more persons guilty as principals, and others as accessories. A *principal* is he who is the actor or actual perpetrator of the crime, or who is present aiding and abetting in the commission of the criminal act.

It is not necessary that a man should do the evil deed with his own hands to constitute him the principal actor. One may be a murderer by means which he had prepared beforehand; as if he should prepare poison, and induce another person, who was ignorant of its deleterious qualities, to drink it at some future time, or place it in his way with the intention of having him do so; or should lay a trap for another whereby the latter is killed; or should loosen a wild beast for the purpose of having it destroy one who should come in its way. In all such cases, the person who prepared the means whereby the act was done will be deemed to have done the act.

Who is called a principal in the commission of a crime? May one be a principal though he does not do the act with his own hands? Give some instances in which he would be so considered.

Nor is it necessary, to constitute one who is aiding and abetting in the commission of a crime a principal, that he should actually be standing by, within sight or hearing of the act. In some cases he will be deemed to be constructively present,—as when one commits robbery or murder, and another keeps watch or guard at some convenient distance.

An *accessory* is one who is not the chief actor in the offence, nor yet present either actually or constructively at its performance, but who is someway concerned therein, either before or after the act was committed.

Accessories before the fact are persons absent when the crime was committed, but who had procured, counselled, or commanded another to perpetrate it. Mere concealment of a crime to be committed, or mere tacit acquiescence, does not make one an accessory, though he would be guilty of what is called a *misprision* of the felony, and is liable to punishment therefor.

It is a rule of law that he who in anywise counsels or commands another to do an unlawful act is accessory to all that ensues from the performance of that act. But he is not accessory to any act different from that counselled or commanded. Thus, if A commands B to beat C, and B does beat C so that he dies, B is guilty of murder as principal, and A is also guilty of the same crime as an accessory. But if A commands B to burn C's house, and he in so doing commits a robbery, A, though accessory to the burning, is not accessory to the robbery, for that is a different and un consequential thing. If, however, the crime committed

How may one who is aiding and abetting be a principal, though not within sight or hearing of the act? Who is an accessory? Who are accessories before the fact? Of what offence is one guilty who merely withholds information of a crime to be committed, or tacitly acquiesces in its commission? To what extent is one who commands or procures an act to be done responsible, as an accessory, for all that ensues from the performance of the act? Give some examples.

be the same in substance,—as if the command was to poison C, and he was stabbed or shot to death,—the person who gave the command would be accessory to the murder; for the substance of the thing commanded being the murder of C, the mere variation in the manner of its execution would be no excuse.

Accessories after the fact are those who conceal an offender, knowing that he has committed a crime, or give him other aid to enable him to avoid arrest, trial, conviction, or punishment. To furnish a criminal with a horse to enable him to escape from officers pursuing him; or the use of force and violence to rescue and protect him; or the furnishing him with instruments to break jail—will render the person giving such aid an accessory after the fact to the crime committed. But the relief given must be of a positive character, and operate in some way as a hinderance of public justice. The merely suffering a criminal to escape does not make one an accessory.

CHAPTER LXXVI.

OF TREASON.

THE highest or greatest crime which can be committed in violation of the criminal laws of the United States is called *treason*. The word “treason” is derived from a French

If the act committed be the same in substance as that commanded, will the person who gave the command be an accessory, though there was a variation in the manner of its execution? Give an example. Who are accessories after the fact? Mention some acts that will constitute one such an accessory.

What is the greatest crime in violation of the criminal laws of the United States?

word signifying to *betray*, and denotes the crime of treachery or infidelity to one's lawful government.

It has been seen, in a former chapter, that the constitution provides that treason against the United States can only be committed by levying war against them, or by adhering to their enemies, giving them aid and comfort.

To *levy war* is to raise, create, make, or carry on war, by the employment of actual force. There must be an assemblage of persons having some means and the design to make war, but neither arms nor the actual application of the force to the object are indispensably requisite. Hence, a meeting of a body of men, designing a treasonable purpose, such as war against the government, or the revolutionizing any of its territories, they being in a condition to make such war, constitutes a levying of war.

The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, is such an assemblage as will constitute a levying of war; and to march in arms, with a force marshalled and arrayed, to compel the resignation of a public officer and to oppose the execution of a law of Congress, is treason.

When war is levied, all those who perform a part, however minute, or however remote from the scene of action, being leagued in the general conspiracy, commit treason. Thus, a commissary of purchases, or a recruiting-officer, who never saw the army of the conspirators, is guilty of treason in executing his office.

But a mere conspiracy to levy war is not treason; nor

What does the word "treason" signify? How can treason be committed against the United States? What do the words "to levy war" mean? What kind of an assemblage of persons must there be to constitute a levying of war? When will the meeting and marching of bodies of men be deemed a levying of war? When war is levied, how may persons remote from the scene of action be guilty of treason?

is a secret, unarmed meeting of conspirators, not in force nor in warlike form, though the meeting was held with a treasonable intent; nor is the travelling of individuals to a place of rendezvous, separately or together, but not in military form, a levying of war.

Enemies are the subjects of foreign powers with whom we are at war. *Adhering* to them, or giving them *aid* and *comfort*, is the co-operation with them, or the affording them aid and assistance in their hostile attempts against the public authorities, or against the people of our own country. But if a person be under circumstances of actual force or constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his adherence to the public enemies, or his giving them aid and comfort, provided he ceases to do so whenever he has a safe opportunity.

By the laws of the United States, if any person having a knowledge of the commission of any treason, shall conceal, and not, as soon as he conveniently can, disclose the same to the president or some one of the judges of the United States, or to the governor or some one of the judges or justices of a state, he will be guilty of a lesser offence, called *misprision of treason*.

By the common law, it was treason to *compass* or *imagine* the death of the king, or to violate the king's wife or eldest daughter, or even to counterfeit the king's money. Of course, no such acts can amount to treason in this country.

Will a mere conspiracy to commit treason, or an unarmed meeting of conspirators, be deemed treason? Who are enemies? What does adhering to them, or the giving them aid and comfort, mean? What will excuse a person for adhering to the public enemies, or giving them aid and comfort? What acts constitute the offence called misprision of treason?

The punishment for this crime was intended by the common law to be very terrible. The criminal was to be dragged to the gallows, and not be carried or permitted to walk. Usually, indeed, he was, by the tacit connivance of the public authorities, drawn upon a sledge or hurdle, to avoid the extreme cruelty of dragging him upon the ground. After being hanged by the neck, he was cut down before life was extinct, and his bowels were taken out and burned while he was yet living.

All such refinements of cruelty have been abolished in this country, as useless, unnatural, and barbarous. The punishment provided by law for persons convicted of treason is death, but it is inflicted without subjecting the criminal to any unnecessary torture. The penalty for misprision of treason is imprisonment for a period of time not exceeding seven years, and a fine not exceeding one thousand dollars.

CHAPTER LXXVII.

OF PIRACY.

PERSONS who rove about the seas, having no fixed place of residence, acknowledging no country and no laws, and supporting themselves by pillage and depredations, are called pirates. By the common law, *piracy* was defined to be the commission of those acts of robbery

What was the punishment for treason by the common law? What is the punishment provided by law in this country? What is the penalty for misprision of treason?

How was the crime of piracy defined by the common law?

and depredation upon the high seas, which, if committed upon land, would have amounted to felony.

By the laws of the United States, piracy is the commission, upon the high seas or in any river, basin, or bay out of the jurisdiction of any particular state, of murder, robbery, or any other offence, which, if committed within the body of a county, would be punishable with death.

It is also made piracy, by the laws of Congress, if any *captain* or *mariner* shall run away with any vessel, or any goods or merchandise of the value of fifty dollars, with an intent to convert such vessel or merchandise to his own use; or shall yield up such vessel, voluntarily, to a pirate; or if any *seaman* shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust; or if *any person* shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any vessel, or upon any of the ship's company of any vessel, or the lading thereof; or if *any person* engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical vessel, shall land from such vessel and commit robbery on shore.

It is also made piracy if any *citizen of the United States*, being of the crew or ship's company of any foreign vessel engaged in the slave-trade, or of any vessel owned in whole or in part or navigated for and in behalf of any citizen of the United States, shall land

How is piracy defined according to the laws of this country? Under what circumstances will a captain or mariner who runs away with a vessel or goods be deemed guilty of piracy? Or who yields up a vessel? Or a seaman who lays violent hands upon his commander? Or any person who commits the crime of robbery upon a vessel? Or any person engaged in a piratical cruise?

from such vessel, and, on any foreign shore, seize any negro or mulatto not held to service or labour by the laws of either of the states or territories of the United States, with an intent to make such negro or mulatto a slave; or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board any such vessel, with the intent aforesaid.

It is also piracy if any *citizen of the United States*, being one of the crew of any foreign vessel engaged in the slave-trade, or if *any person whomsoever*, being of the crew of any vessel owned wholly or in part or navigated for or in behalf of any citizen of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining any negro or mulatto on board such vessel, with an intent to make such negro or mulatto a slave; or shall, on board any such vessel, offer or attempt to sell any such negro or mulatto as a slave; or shall, on the high seas or anywhere on tide-water, transfer or deliver over to any other vessel, any such negro or mulatto, with intent to make such negro or mulatto a slave; or shall land or deliver on shore from on board any such vessel any such negro or mulatto, with intent to make sale of, or having previously sold such negro or mulatto as a slave.

The punishment inflicted by our laws, for piracy, is death; and any one who is convicted of being an *accessory before the fact* to any act of piracy is subject to the

Under what circumstances will a citizen of the United States commit piracy by seizing a negro or mulatto upon a foreign shore? Or by receiving such negro or mulatto on board a ship? Under what circumstances will a citizen of this country, or any other person, commit piracy by detaining a negro or mulatto on board a ship? Or by offering to sell such negro or mulatto? Or by transferring such negro or mulatto to another vessel? Or by delivering such negro or mulatto on shore? What is the punishment inflicted for piracy? What are the penalties to which persons accessory to this crime are subject?

same penalty. An *accessory after the fact* may be imprisoned for any period of time not exceeding three years, and fined in any sum not exceeding five hundred dollars.

Piracy is an offence against the universal law of society, or the law of nations, a pirate being an enemy of the whole human race. Therefore, as he has renounced the benefits of society and government, and reduced himself to the condition of a savage outlaw, by making war upon all mankind, every community has a right, in self-defence, to arrest and punish him wherever he may be found; and he can claim no protection from the state or government to which he may originally have owed allegiance. Consequently, our courts, as well as those of other nations, assume jurisdiction to try and punish all persons found on board of any vessel which has thrown off its national character by cruising piratically and committing piracy on other vessels.

CHAPTER LXXVIII.

OF HOMICIDE.

HOMICIDE is the killing of any human creature; and it is said, in law, there are three kinds—namely, justifiable, excusable, and felonious homicides.

A *justifiable homicide* may be occasioned by some unavoidable necessity, without any will, intention, or desire, and yet without any inadvertence or negligence in the

Upon what grounds do our courts assume jurisdiction to try and punish pirates who are not citizens of the country?

What is a homicide? How may a justifiable homicide be occasioned?

party killing. It may also be either of a public or private nature. When of a public nature, it is such as is occasioned by the due execution or advancement of public justice. When of a private nature, it is such as happens in the lawful defence of a man's person or goods.

A common instance of the first kind occurs when an officer, in the performance of his duty, is required to execute the sentence upon a person who has been lawfully condemned to suffer death. This is an act of necessity, and even of civil duty; but the law must require it, or it would not be justifiable. There must be a legal judgment, and it must be executed by the proper officer; for if any one not required to do so by law—even the highest public officer—should put the greatest malefactor to death, it would be murder. And the officer required to execute the sentence must execute the very sentence, and no other. If he should hang one sentenced to be shot, or shoot one condemned to be hanged, it would be murder, for he would have no right to act upon his own authority.

A justifiable homicide of a private nature may occur when a man kills one who assaults him with an intent to commit robbery or murder; or when the owner of a house, or his servants, kill one who attempts to burn it. In these, and in many similar cases, the homicide would be justifiable. There must, however, be, in all cases, an apparent necessity for the homicide, and he who does it must not bring that necessity upon himself by any fault of his own. Consequently, if a number of persons should riotously and wrongfully take possession of a house by

When is homicide of a public nature? When of a private nature? Give a common instance of a justifiable homicide of a public nature. By whom must it be executed? How must it be executed? When may a justifiable homicide of a private nature occur? What kind of necessity must there be for such a homicide? Give an example when a homicide would not be justifiable, because those who committed it brought the necessity upon themselves.

force, they would not be justified in killing those who should attack it from without and endeavour to burn it.

Excusable homicide is also of two kinds. One species is where the killing is the result of some accident or misadventure; as when a man, doing a lawful act, and without any intention, unfortunately kills another. The other species is where one man kills another in self-defence.

Every person, even in doing a lawful act, is bound to use due care and precaution to prevent injury happening to others; and a homicide resulting from a wanton or reckless disregard of the consequences of an act done will not be excusable, although there should have been no positive intention to commit it. Thus, if one should be driving a carriage and should happen to kill another, if the accident happened in such manner that no want of due care could be imputed to the driver, it would be an accidental and excusable homicide; but if he saw, or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it would be murder; and if he might have seen the danger, but carelessly neglected to look before him, it might be deemed the lesser crime of manslaughter.

The kind of homicide that is excusable when committed in self-defence, is that which occurs when one man protects himself from a sudden assault by killing the assailant. The right of self-defence may always be exercised, by the use of such means as are necessary to protect one's self from an immediately impending danger, without re-

How many kinds of excusable homicide are there? What precaution should there be used to render a homicide occurring accidentally excusable? What are the consequences if it results from carelessness or wilful neglect? If one should be driving a carriage and happen to kill another, what circumstances would make the homicide excusable? What circumstances would cause it to be considered murder or manslaughter? When does an excusable homicide, committed in self-defence, occur?

gard to the consequences that may ensue to the person by whom the danger was occasioned. But the means used should be graduated according to the necessity of the case. No greater injury should be inflicted on the assailing party than is absolutely necessary for the protection of the person assailed. The latter should, therefore, before resorting to such extreme means, use his utmost endeavours to avoid or retreat from danger; and he will not be excusable for killing his assailant unless he is placed in such circumstances that he has no other possible, or, at least, probable means of escaping, and great and immediate suffering would be the consequence of waiting for the assistance of the law.

CHAPTER LXXIX.

OF FELONIOUS HOMICIDE.

A *felonious homicide* is the killing of a human being, of any age or sex, without justification or excuse. There are degrees of guilt which occasion the division of this offence into two kinds—namely, manslaughter and murder.

Manslaughter is defined to be the unlawful killing of another *without malice*, either express or implied; which may be done either voluntarily, upon a sudden provocation,

What necessity must there be, to render such a homicide excusable? How must the assailed party endeavour to avoid or retreat from the danger?

What is a felonious homicide? How many kinds of this offence are there? Define the crime of manslaughter.

or involuntarily, but in the commission of some unlawful act.

If a man be unexpectedly thrown into a sudden heat or passion,—as by the infliction upon him of some great personal indignity,—and, thereupon, immediately kills the aggressor, though this is not excusable as an act of self-defence, because there is no absolute necessity for his doing it to preserve himself, yet neither is it murder, for there is no previous malice; but it is manslaughter. In this and all other cases of homicide upon provocation, when there is sufficient time for the passion roused to subside, and for the offended person to resume the exercise of his reason, if he afterward pursue and kill the one who gave the offence, it will not be manslaughter, but murder; for the killing would then be done for deliberate revenge, and not from heat of blood.

It has been already explained that the killing another accidentally is only excusable when the accident happens in the doing of a lawful act with due care and circumspection. It therefore need only be remarked here, that when death is the consequence of the doing an unlawful act, as of idle, dangerous, and unlawful sports, or of heedless, wanton, and indiscreet acts in the doing of something which may in itself be lawful, the party causing the death will be guilty of involuntary manslaughter.

Murder is the highest grade of homicide, and has ever been regarded, by all civilized nations, as one of the most atrocious and horrible crimes. The term is derived from the Teutonic language, and originally signified the secret killing of another; and in this sense it is used in some of

Under what circumstances will a voluntary killing be deemed manslaughter? Under what circumstances will a death occasioned in voluntarily be manslaughter? What is the highest grade of homicide called? From whence is the term "murder" derived? What did the word originally signify?

the old English statutes. But the word "murder" is now understood to denote, in law, the wilful killing of any human being, contrary to law, and with *malice aforethought*.

The killing may be by poisoning, striking, shooting, stabbing, starving, drowning, or any other form of death by which human nature may be overcome. There must be an actual killing to constitute murder, but it is not necessary that death should ensue immediately or instantaneously upon the commission of the murderous act. If a man does any act of which the probable consequence may be and is death, whether the act be one of sudden violence or otherwise, and whether life is extinguished at once or the injury inflicted occasions a lingering sickness, terminating in death at a future period, such killing may be murder.

So, also, if one person, by means of superior strength or authority, knowingly and wilfully places another in a situation which may be dangerous to life or health, and death actually ensues in consequence, it will be murder. Thus, an unnatural son was convicted of murder for exposing his sick father to the air against his will, by reason of which he died; and a harlot, who laid her child under leaves in an orchard, where a hawk struck and killed it; and a jailer, who confined a prisoner in the same room with another who had an infectious disease, which the first took and died; and certain parish officers, who shifted a child from parish to parish, till it died from want of care and sustenance.

The great criterion which distinguishes murder from all

What does the word "murder" now denote in law? By what means must the killing be effected, to constitute the crime of murder? When must death ensue? How may murder be committed by placing a person in a dangerous situation? Give some instances of murders so committed.

other species of homicide is, that the killing must be done maliciously, or with malice aforethought. By *malice* is meant not only some spite or malevolence toward the deceased in particular, but any depraved or evil design. Thus, if one man kills another for the purpose of robbing him, or if one discharges a gun among a number of people, though he may have had no particular spite against the person who is slain, the killing will be deemed malicious from the general evil design with which the deed was perpetrated.

In many cases, where the facts do not disclose with what particular intent the deed was done, and, therefore, no express malice is shown, the law will imply malice. Thus, if one deliberately poisons another, though no particular enmity can be proved, and no other definite object of the perpetrator is made apparent, yet malice will be inferred from the act itself. Every one must be presumed to have intended to do that which naturally or necessarily results from his voluntary acts; and if one intentionally kills another, without justification or excuse, his act cannot be otherwise than malicious.

So, when a person uses means naturally calculated to produce death, the law raises a *presumption* that the means were used with the *intention* that such a result should follow. If a man fires a gun loaded with ball at the breast of another, it will be presumed, of course, that it was done with an intention to kill. And so, where a boy was stealing wood, and the owner tied him to a horse's tail, and thus caused him to be dragged along

What is the criterion by which murder is distinguished from other homicides? What is meant by the term "malice?" Give some examples of a general evil design which will render a killing malicious. How will malice be implied when the particular intent with which the deed was done is not disclosed? Under what circumstances will the law raise a presumption that the killing was done intentionally?

the ground; where a master corrected his apprentice with an iron bar; and where a schoolmaster stamped on his scholar's belly—so that each of the sufferers died—these were decided to be murders, because means and instruments likely to produce death were used, and it was to be inferred they were used with the intention to produce the result which naturally followed.

The malice must be *aforethought*, that is, it must have been entertained before the commission of the deed; but it matters not how short the time may have been, so that it was sufficient to enable the perpetrator to comprehend the consequences of his act. There are cases, however, in which the time during which the murderer may have been deliberating upon and harbouring his criminal design, may invest the deed with a greater degree of atrocity; and this has given rise to a division of the crime, in some of the states, into two or more degrees, called *murder in the first, second, or third degree*. The crime of manslaughter has also been divided, in some of the states, in the same manner.

The punishment inflicted for the crime of murder by the laws of the United States, and also by the laws of almost all the states, is death. In some states, where the crime is divided into different degrees, murder in the first degree is punished by death, and murder in the other degrees by a fine and imprisonment at hard labour.

Manslaughter is punished by fine and imprisonment. As there can be no premeditation in the crime of manslaughter, there can be no accessories before the fact.

Give some examples where the intention to kill has been presumed from the means used. How long before the commission of the deed must the malice have been entertained? How has this crime been divided, in some of the states? What is the punishment inflicted for murder? How is manslaughter punished?

In the crime of murder, there may be accessories both before and after the fact, and they also are punished by fine and imprisonment.

Persons convicted of these and other crimes of an aggravated or infamous character are also, in addition to the above-mentioned punishments, frequently condemned to be disfranchised and rendered incapable of holding any office of trust under the government, during life, or during a certain period of time.

CHAPTER LXXX.

OF ARSON AND BURGLARY.

ARSON is the malicious and wilful burning of the house or outhouse of another person. This has always been considered a very heinous offence, since it is not only liable to occasion great damage itself, but is frequently the cause of murder, as well as of other additional and atrocious crimes.

Not only the bare *dwelling-house*, but all *outhouses* that are parcel thereof, though not under the same roof, such as barns and stables, may be the subjects of arson.

The appellation of this crime is derived from the Latin word *ardeo*, to burn. The burning must be occasioned *maliciously* and *voluntarily*. If a house is fired by

What is the punishment of accessories to the crimes of murder and manslaughter? To what additional punishment are persons convicted of these and other infamous crimes subjected, in this country?

What is arson? What are the subjects of arson? How must the burning be occasioned?

negligence or mischance, even in doing an unlawful act, it cannot be arson. Thus, where one shot a gun at the pantry of another, and so set the house of the latter on fire, it was not arson, because he had no intention to burn the house.

There must be an *actual burning*. If fire is put into a house or any part of it, and there is no burning, it will not be arson. But if any part of the house or building is burned, though the fire is put out or goes out of itself before any considerable damage is done, arson is committed.

In some of the states, this crime is punished by death, or by imprisonment at hard labour and a fine, when the attendant circumstances render the case a very aggravated one or otherwise. In other states, fine and imprisonment only are inflicted.

By the laws of Congress, the wilful and malicious burning of any vessel of war of the United States by any person, or of any dwelling-house, store, barn, stable, or other building, parcel of any dwelling-house, within any fort, dock-yard, navy-yard, &c., the site whereof is ceded to the United States, is punished by death. The burning of any arsenal, armory, rope-walk, or other building, not parcel of a dwelling-house, within the places so ceded, is punished by fine and imprisonment.

BURGLARY is the breaking and entering the mansion-house of another, or a church, in the night, with intent to commit some crime therein, whether the criminal intent be executed or not.

There must be both a *breaking* and an *entry* to complete this offence. Every entrance into a house by a trespasser is not a breaking in the sense here meant—

May arson be done by negligence or mischance? How must there be an actual burning? How is this crime punished by the state laws? How is it punished by the laws of Congress? What is burglary?

there must be an actual breaking. Thus, if the door stands open and a thief enters, it is no breaking. So, if a door or window be open, and the thief, with a hook or other instrument, draws out goods—this is not burglary, because there is no actual breaking of the house. But if the thief breaks the glass of a window, or picks the lock of a door, or even unlatches a door or window that is only latched—or if he gets into the house by artifice, as by pretending business, and then robs the house—it will be burglary.

Any entry, either with the whole or but a part of the body, if but one finger, or with any instrument or weapon, after the house is broken, will be sufficient to constitute the offence. But when thieves had bored a hole through the door, and some of the chips were found inside of the house, yet, as they had neither got in themselves nor introduced a hand or instrument for the purpose of taking property, the offence was deemed incomplete.

The building, if it be not a *church*, must be a *dwelling-house*, or mansion wherein some one dwells, at least occasionally; but the inhabitants need not be, at the time, within it. No distant barn or stable, or house that is permanently vacant, will answer the term *mansion-house*; but all out-buildings, such as barns, stables, warehouses, &c., adjoining a mansion-house, are considered as part thereof, and, therefore, burglary may be committed upon them. The statutes of some of the states have, however, extended this crime to the breaking of a store, office, shop, outhouse, or boat.

The offence must be committed during the *night*, for in

How must there be an actual breaking to constitute the offence of burglary? How must an entry be made? Upon what kinds of buildings can burglary be committed? At what time of the day must the offence be committed?

the day-time there can be no burglary. The night-time here meant commences when there is no longer sufficient daylight to discern clearly a man's face, and ends at a corresponding period the next morning. But the crime may be committed though minute objects are discernible by moonlight; the malignity of the offence arising not so much from its being done in darkness as from its being done at that period of the night when sleep is supposed to have disarmed the owner and left his house defenceless.

There must be an *intent* to commit *robbery*, *murder*, or some other *felonious crime*; otherwise, the breaking and entry would be only a trespass. But it is immaterial whether the intention be actually carried into execution, or only demonstrated by some attempt or act in such manner that the jury are convinced of its existence.

The punishment of this crime, by the English law, is death; and by the ancient Saxon law the criminal was burned alive. By the laws of the several states of the Union, the punishment inflicted is usually a fine and imprisonment at hard labour.

What is meant by the night-time during which this offence may be committed? With what intent must the breaking and entry be made? Is it material whether that intention be actually carried into execution or not? What is the punishment inflicted for this crime?

CHAPTER LXXXI.

OF LARCENY.

LARCENY—which is derived from a word signifying theft—is the term used to denote a crime which is divided by the law into two kinds. One is called simple larceny, or mere theft, unaccompanied by any other atrocious circumstances; and the other, mixed or compound larceny.

Simple larceny is again subdivided into *petit* or *small larceny*, and *grand larceny*, according to the value of the property stolen; but the only difference thus occasioned is in the degree of punishment inflicted.

Simple larceny is defined to be the felonious taking and carrying away the personal goods of another.

In larceny, there must be a *taking* without the consent of the owner. Therefore, if goods be delivered upon trust—as if A lends B a horse, and the latter runs away with him—this will not be larceny. So, it is said, if one sends goods by a carrier, and he carries them away, it is not larceny; but if a carrier opens a bale or pack of goods, or pierces a cask of liquor, and takes away a part, or if he carries them to the place appointed, and afterward takes away a part or the whole, these will be larcenies; for, in the first case, he gets possession of the part distinct from the whole, wrongfully, and without a

From whence is the term “larceny” derived? Into what different species of offences is this crime divided? How is simple larceny subdivided? Define simple larceny. What kind of a taking must there be? Give some examples.

delivery from the owner, and in the latter the trust was determined, the delivery having taken effect.

But where one has only the care and oversight of goods, as where the clerk of a merchant has the care of money or other property; or where the goods are obtained upon a bare charge to do something with them, as to deliver them to a customer;—the possession is supposed to remain with the proprietor, and the stealing them by the person so having them is larceny.

The taking must be *felonious*, or with an intention to steal the thing taken; and this intention must exist at the time the goods first come into the possession of the offender. If one obtains the possession of goods lawfully, and without any fraudulent intent at the time, and he afterward conceives such an intent and actually carries it into execution—though the embezzlement may be criminal, it will not be larceny. Thus, if a person intending to go a journey hires a horse fairly for that purpose, but after he has started conceives a design to steal the animal and rides away with him, it would not be larceny, because the felonious design was hatched after the horse had come lawfully into the possession of such person.

But if the possession be obtained by any *fraudulent pretence*, and with a design to steal the thing delivered, although the owner in this case parts with the thing itself, he still retains, in law, the constructive possession of it. In other words, the owner will not be considered as having voluntarily parted with his property, for a consent obtained by fraud is wholly nugatory. Therefore,

In what cases is the owner supposed to retain possession of the goods, when they are placed in charge of another? With what intention must the goods be taken? At what time must that intention be conceived? Give some examples when the taking would not be felonious, because the criminal intent was conceived afterward? If the consent of the owner be obtained by fraudulent pretences, will the taking be felonious? Why would it be so?

if a horse, or any other article of personal property, be obtained under the pretence of hiring or borrowing, the real intention at the time being to steal, the taking will be as felonious as if it had been done secretly and without the owner's consent.

There must not only be a taking, but a *carrying away*, or removal of the goods. But the slightest movement of an article from the place where it was situated will be sufficient. Therefore, when a thief, intending to steal plate, had taken it from a chest and placed it upon the floor; and when another had snatched a ring from a lady's ear, but it lodged in the curls of her hair—and each was detected before he could proceed further—they were convicted.

The taking and carrying away must be of the *personal goods* of another. Larceny cannot be committed on real property; and if the article taken is something attached to the freehold, the taking will only amount to a trespass. This has given rise to some very nice distinctions,—as the stealing of potatoes after they had been dug up and placed upon the surface of the ground, or of corn that had been separated from the stalk, has been considered larceny; when, if the thief had dug the potatoes or taken the corn before they had been previously separated from the earth and had thus acquired the qualities of personal property, his offence would only have been a trespass. But to remedy the consequences of these niceties, the modern statute laws provide for the punishment of many injuries to real property in the same manner, though they may not, strictly, come under the denomination of larcenies.

The thing taken must be the property of *another*;

How must there be a removal of the goods? Give some examples. Of what species must the goods be? Can larceny be committed on real property? To what niceties has this distinction given rise?

and, therefore, larceny cannot be committed of things which have no owner, such as beasts running wild in the forests or fish swimming at large in the seas or watercourses. Under some circumstances, indeed, a man may be guilty of larceny in taking his own goods. This would be the case if he should secretly steal them from one to whom he had pledged them, or from one who had a right to retain the possession of them until some charge was paid or some duty performed by the general owner. In these instances the goods would be considered the property of the person from whom they were taken, he having a qualified ownership, against which such a taking would be an unwarrantable aggression.

Robbery is defined to be the felonious and forcible taking, from the person of another, goods or money of any value, by violence or putting him in fear. It is the only species of mixed larceny which our laws distinguish from common larceny.

There must be a taking *from the person* of the owner to constitute a robbery; but this requisite is answered if goods be taken in the immediate presence of the owner, though not strictly from his person—as where a robber, by threats and violence, puts a man in fear and drives away his sheep or cattle before his face.

The thing taken must be of *some value*—though it is immaterial what value. The value of a penny, as well as of a dollar, thus forcibly extorted, will be sufficient.

The thing must be taken *by force* or a previous putting in fear, which is the criterion which distinguishes this

Can larceny be committed of goods that have no owner? Can one be guilty of this crime by taking his own goods? Under what circumstances? Define robbery. Must the goods be taken strictly from the person of the owner? Give an example of a robbery where they are taken in his presence. Of what value must the thing taken be? What is the criterion which distinguishes this crime from simple larceny?

offence from other larcenies, and is supposed to render it more atrocious. Therefore, if one steals an article from another, and afterward keeps it by putting the owner in fear, this will not be robbery, for the fear is aroused subsequent to the act.

It is not necessary that a great degree of terror or affright should be excited in the party robbed. It is enough if so much force or threatening, by word or gesture, be used as might create an apprehension of danger, or induce a man to part with his property against his will or consent. If a man be knocked down, and stripped of his valuables while senseless, though it could not perhaps be said that he had experienced the sensation of fear, it would undoubtedly be a robbery.

It is said that if any thing is snatched suddenly from the head, hand, or person of another, without any struggle on the part of the owner, or without any evidence of violence or force exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in consequence of the sudden seizure—as where part of a lady's hair was torn away by snatching a diamond pin from her head, and where an ear was torn by pulling away an ear-ring—it will be evidence of such force as will constitute a robbery.

Both kinds of larceny are punished, by the laws of the United States and of the several states, by fine and imprisonment. When any person shall be convicted a second time of robbing the mail of the United States, or when, in effecting such robbery the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons—capital punishment may be inflicted.

What degree of force or violence must there be used? Under what circumstances will it be robbery if a thing is snatched suddenly from another? How are larcenies punished?

CHAPTER LXXXII.

OF OTHER CRIMES DEEMED INFAMOUS AND FELONIOUS.

BESIDES those mentioned in the preceding chapters, there are several other crimes that are deemed infamous and felonious. Among these are the following:—

FORGERY is the false making, altering, or counterfeiting any deed, note, bill, coin, brand, stamp, or other instrument of value, with an intent to defraud any person or persons. The term is derived from a French word signifying “to beat an anvil,” to *forge*, or form.

Forgery may be committed either by making an instrument wholly false, or by making a fraudulent insertion, alteration, or erasure in any material part of a true document, whereby another may be defrauded. The fraudulent application of a false signature to a true instrument or a real signature to a false instrument, the altering a bank-note, a bill, or note of hand from a lower to a higher sum, or any material alteration of an instrument, however slight, will be a forgery as well as an entire fabrication.

Though a name forged be merely fictitious, it is not the less a forgery, if done for the purpose of fraud in the particular case. If a man draws a bill in a fictitious name by which he has long been known, it will not be a forgery. But if a note or bill payable to a certain person or to his order comes into the hands of another person of

Give the definition of forgery. From whence is the term derived? What making or alteration of an instrument will be deemed forgery? Will it be forgery if the name forged be fictitious?

the same name, and he endorses it with a fraudulent intent, it will be forgery.

If several persons combine to forge an instrument, and each executes by himself a distinct part, though they may not be together when the instrument is completed, they are all, nevertheless, guilty as principals.

There must be an *intention to defraud* some person or persons, but it is not essential that any actual injury should result. Neither is it necessary that there should be an intention to defraud any particular individual. A general intention to defraud whoever should come into possession of the instrument is sufficient.

When a bank-note, coin, or other instrument is counterfeited, with a view to its being passed or circulated from one person to another, the instrument forged must resemble the true instrument which it purports to be sufficiently to be deceptive. It is not necessary, in order to prove that a counterfeited bank-note is a forgery, that it should so nearly resemble the true note that an officer of the bank or one skilled in the knowledge of money should swear that he could not detect the fallacy, but there should be such a resemblance that an ordinary person, using ordinary means of observation, might probably be deceived by it.

There are numerous statute laws of the United States and of the several states, prescribing the punishment for forging different kinds of instruments. The uttering, or passing as true, forged bank notes, coin, &c., knowing

If an instrument be payable to a certain person, and it comes to the hands of another person of the same name, and he endorses it, will it be forgery? If several persons combine to forge an instrument, and each executes a distinct part, and they are not together when it is completed, how will they be guilty? What intention to defraud must there be? What resemblance must a forged instrument have to the true instrument which it purports to be? What statutes are there relative to the passing or uttering and the fabrication of counterfeited money?

them to be forged, is made an offence similar to that of forgery. And, with the view of preventing the fabrication of counterfeited money, there are statutes making it highly penal to make or engrave any plate in the form of a note of any chartered bank without the permission of such bank; or to have or keep false dies or other instruments to be used for making counterfeited coin; or to have or keep any forged money or bank-notes, with an intent to utter it fraudulently.

The forgery of any certificate, indent, or public security of the United States, or the uttering or passing any such certificate, indent, or public security, in payment or for sale, with intent to defraud, subjects the offender to capital punishment. The forging of coin or other instruments is generally punished by fine and imprisonment at hard labour.

PERJURY, by the common law, is defined to be a wilful false oath corruptly taken, by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely, in a matter of some consequence to the point in question, whether he be believed or not. According to this definition, if the oath was not taken in the course of some judicial proceeding it was not perjury; but the crime has been extended, by various statute laws, to a false oath taken in any case where an oath may lawfully be required by any judicial, executive, or administrative officer.

The oath must be *false*—but an oath may be false even though the fact sworn to be true; and persons have been convicted of perjury for having sworn to a thing that was true when, in fact, they had no knowledge whether it was true or not. If a person swears absolutely to the existence

What is the punishment for forgery? Give the definition of perjury? How has this crime been extended by statute laws? May the oath be false though the fact sworn to be true? How may this be so?

of a fact he, in effect, swears that he knows of its existence, and, if he has no knowledge whatever of the subject, his oath is not the less false though the fact may happen to exist.

The false oath must be taken *wilfully*, or with some degree of deliberation, and with a corrupt intent or knowledge of its falsity, not merely from inadvertence or mistake.

The oath ought to be taken by one sworn to *depose the truth*; therefore, a false verdict does not come within the idea of perjury, because the jurors do not swear to depose the truth, but only to judge truly of the depositions of others.

The oath must be taken before some one *authorized by law* to administer it. If it be taken before a person acting merely in a private capacity, or pretending to legal authority to administer such oath, but having none, it will not be perjury.

The oath must be *absolute*, or positive. One cannot be guilty of perjury in merely stating an opinion; but he may be by swearing that he believes a fact to be true when he knows it to be false.

The thing sworn to must be in some way *material*; for if it be foreign to the purpose or immaterial, and neither pertinent to the matter in question nor having any tendency to influence the court or jury or to injure either of the parties, it will not be perjury, because it is entirely insignificant. But it is of no consequence whether the false oath was credited or not, or whether the party to whose prejudice it was taken was eventually injured by it; for

With what intent or knowledge must the oath be taken? What must the person by whom the oath is taken be sworn to do? Before whom must it be taken? How must it be absolute or positive? How must the thing sworn to be material? Is it of any consequence whether the false oath was believed or not?

the prosecution is not grounded on the damage to the party, but on the abuse of public justice.

On the trial of a person prosecuted for this crime, the oath alleged to be false will be presumed to be true until it be disproved; and, therefore, one credible witness is not enough to establish its falsity. The evidence must be strong, clear, and more weighty on the part of the prosecution than on the part of the defendant, as to this point. It is necessary, as has been already stated in a former chapter, that there should be two witnesses, or one witness who swears directly to the falsity of the oath, and corroborating circumstances sufficient to be as satisfactory to the minds of the jury as the direct testimony of another witness, to counterbalance the oath already sworn to by the defendant.

SUBORNATION OF PERJURY is the procuring a person to take a false oath amounting to perjury.

The punishment of perjury and subornation, at common law has been various. Anciently, it was death—afterward, banishment or cutting out the tongue. In some cases the offender was condemned to stand in a pillory with both ears nailed thereto. In this country it is punished by a fine and imprisonment at hard labour.

KIDNAPPING is the forcible abduction or the stealing away of a man, woman, or child, from their own country, and sending them into another. By the statutes of several of the states, if any one shall kidnap or unlawfully arrest any man, woman, or child, and carry such person to parts without the state, or aid and abet in doing so, without having first established a claim upon the services of such person, according to the laws of the United States or of the state in which the act is committed, he

What peculiarity is there as to the amount of evidence necessary to prove this crime? What is subornation of perjury? What is the punishment of perjury and subornation? Define kidnapping.

will be subject to a fine and imprisonment at hard labour.

BIGAMY is the crime of contracting another marriage before the termination, by death or divorce, of a marriage with a former husband or wife. Such second marriage is void and a mere nullity; but our legislatures have thought proper to make it a serious crime, in consequence of its being a great violation of decency and propriety, and also because the contracting of such a marriage by the party, who well knows its illegality, with another who is ignorant of the existence of the other's prior wife or husband, is one of the most atrocious and injurious frauds that can be perpetrated.

RAPE is the having carnal knowledge of a woman forcibly and against her will. This has always been considered a most detestable crime, and deserving of the severest punishment. By the Jewish law, the civil law, and the ancient Saxon law, it was punished by death. By our laws, capital punishment is sometimes inflicted, but it is in most cases punished by a fine and imprisonment at hard labour.

CHEATING, at common law, is the crime of defrauding or endeavouring to defraud another of his rights, by means of some deceitful and illegal device, contrary to the rules of common honesty.

There are several offences defined and punished by our statute laws which may be comprised under this head. One is the *embezzlement* or the fraudulently appropriating to one's own use the money or goods intrusted to his care or management. Many of the officers of the government, and, in some of the states, persons in a private capacity,

How is kidnapping punished? Define bigamy. Why is it considered a serious crime? Define rape. How is it punished? In what does the offence called cheating consist at common law? What offences of this kind are there defined and punished under our statute laws?

are subject to severe punishment for so doing. Another offence of this character is the *obtaining goods or money*, or the *signature* of another, by *false pretences*, with an intent to cheat or defraud such person. In this offence, as in larceny, the criminal intent must be conceived or entertained at the time the goods or signature are obtained; for it will not be sufficient if such a design is conceived and carried into effect afterward.

CONSPIRACY, at common law is the confederacy of two or more persons to injure an individual, or do any other unlawful act or acts prejudicial to the community. This offence is committed not only when a confederacy is entered into for an illegal purpose, but also where it is to effect a legal purpose by illegal means; and this whether the purpose is effected or not.

A conspiracy on the high seas or within the United States to cast away, burn, or otherwise destroy any vessel, with intent to injure any person or body politic that hath given a policy of insurance thereon or on any goods on board thereof, or a conspiracy to build or fit out any vessel, with intent that the same shall be so destroyed, is punishable, under the acts of Congress, by a fine not exceeding ten thousand dollars and imprisonment at hard labour not exceeding ten years.

A conspiracy may be a very atrocious crime, or it may amount to a misdemeanour only, according to the purpose or design with which it is entered into. In some of the states, there are statutes making conspiracies for various purposes criminal, and prescribing such punishments as are deemed appropriate.

BRIBERY is the taking by or the offering to a judge or any other officer, judicial or ministerial, any undue reward to influence his behaviour in his office. He who offers a

Define a conspiracy. How is a conspiracy to defraud insurance companies punished under the laws of Congress? Define bribery.

bribe is guilty of this offence though it be not taken. It is punished, under the statutes of the states, by fine and imprisonment at hard labour. By a statute of Congress, it is provided that any person who shall give a bribe to procure the opinion, judgment, or decree of any judge of the United States in any matter pending before him, and any judge who shall accept the same, shall be fined and imprisoned at the discretion of the court, and shall for ever be disqualified to hold any office of honour, trust, or profit.

CHAPTER LXXXIII.

OF BREACHES OF THE PUBLIC PEACE.

ALMOST all crimes are committed in violation of the public peace; but there is a class of minor offences or misdemeanours which the community finds it necessary to suppress, chiefly because of the disturbances or breaches of the peace thereby occasioned. Among these may be enumerated the following:—

BLASPHEMY may be committed by denying the being or providence of the Almighty; by contumelious reproaches of our Saviour Christ; or by malicious scoffings at the Holy Scriptures. *Profane cursing and swearing*, and *profanation of the Lord's day*, vulgarly called Sabbath-breaking, are offences nearly allied to blasphemy.

These are sometimes called offences against God and religion; and though there is no established church in

How is bribery punished?

How may blasphemy be committed?

the United States, the Christian religion has been received as a part of the common law, and they are criminal offences as well by the common law as by numerous statutes of the legislatures and the ordinances of municipal corporations. They occasion disturbances of the peace by their notorious indecency and scandal when committed in public, and the interruption they make to the peaceful and lawful occupations of others.

AN UNLAWFUL ASSEMBLY is when three or more persons assemble themselves together to do an unlawful act, as to pull down the enclosures or destroy the property of an individual, and part without doing it or making any motion toward it.

A ROUT is when three or more persons meet to do an unlawful act upon a common quarrel, as to break down fences or destroy property, and make some advances toward it.

A RIOT is when three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as if they beat a man or injure his property; or even do a lawful act, such as the removal of a nuisance, in a violent and tumultuous manner.

AN AFFRAY is when two or more persons fight, in a public place, to the terror of the citizens. If the fighting be in private it is not an affray.

To constitute a riot, the parties must act without any authority to give colour to their proceedings; for an officer, or even a private individual, when authorized to do a lawful act, may use violent means if they are necessary to do the act in question. The intention also with which the parties act must be evil; for if a sudden disturbance

How are blasphemy and similar offences made criminal? Define an unlawful assembly. A rout. A riot. An affray. To constitute a riot, what absence of authority must there be? With what intention must the parties act?

arise among persons met together for an innocent purpose, that alone will not make them guilty of this offence. But if they should even suddenly engage in any violent proceedings with a mutual understanding or intention, or should be suddenly impelled to do some unlawful act, as to demolish a house, they would be rioters, and would not be excused by the propriety of their original intentions.

An assembly of a man's friends at his own house for the defence of the possession of it, or for the defence of his person against such as threaten to beat him in his house, is lawful; for a man's house is looked upon as his castle, wherein he may defend himself against all assaults. He is not, however, to arm himself or assemble his friends, even for the defence of his person, in a public place; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of violent methods of defence, attended with the danger of raising tumults and disorders, to the disturbance of the public peace.

AN ASSAULT AND BATTERY is when one person, in a rude, insolent, and angry manner, unlawfully touches another. A simple assault and battery, or even an assault, is a misdemeanour, and is punished criminally as a breach of the peace, though the individual injured may have recovered compensation for his private damage in a civil suit.

When an assault is made upon a person with an intent to commit murder, robbery, or other atrocious crime, though the act principally contemplated may not be

In what place may a man lawfully assemble his friends for his protection? How must he provide for his safety in public places? Define an assault and battery. What species of offence is it? When a person is assaulted in an unsuccessful attempt to commit an atrocious crime, what is the nature of the offence committed?

actually perpetrated, by reason of the resistance of the person assaulted, the assistance of others, or any other means whereby the intent of the person making the assault is frustrated, the *assault itself*, accompanied with such *evil intent*, becomes an offence of very grave character, and is punished like other felonious crimes.

THE FORCIBLE ENTRY AND DETAINER OF LANDS consists in violently taking possession, or, after taking, violently keeping possession, of lands and tenements, with menaces, by force, and without the authority of law. If one is in peaceable possession of lands, though another may have a better right, he cannot proceed in a violent manner to turn the former out, but must resort to the proper process of law. But the possession must first have been obtained in a lawful manner, or it will not be considered a possession, but merely an unlawful detainer. If a man, without any right, enters a neighbour's house and attempts to keep possession by violence, he will be guilty of this offence.

Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it is an offence of the same kind. Therefore, challenges to fight, either by word or letter, are criminal, though the fighting does not take place. It is even a misdemeanour merely to endeavour to provoke one to send a challenge, as by posting, writing, or printing any reproachful or contemptuous language calculated and intended directly to provoke a challenge.

On similar principles, *libels* or malicious defamations of any person in print, writing, signs, or pictures, are

In what does the forcible entry and detainer of lands consist? If one is in the peaceable possession of lands, can one who has a better right turn him out by violence? How must a peaceable possession be acquired? What acts tending to provoke or excite others to break the peace are offences of this kind? What are libels?

considered criminal offences. At common law, any representations maliciously made with respect to another, and especially with respect to magistrates or other persons in authority, calculated to expose them to public hatred, contempt, or ridicule, were libellous; and the truth of the representations afforded no justification, because, whether true or not, they were not the less provocative of breaches of the peace. In this country, however, by the constitutions and other statute laws, the truth of the representations charged as libellous may, in most instances, be proved as a defence. Criminal prosecutions for libel are very rare in this country, though civil actions to recover damages for slanders are not uncommon.

CHAPTER LXXXIV.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THERE is a class of misdemeanours which, because of their tendency to obstruct or pervert the cause of justice in the establishment or restoration of the rights of individuals, are called offences against public justice. Among these are the following:—

COMMON BARRATRY is the frequently stirring up suits and quarrels between the people, either at law or otherwise. The word “barrator” signifies a deceiver, and it was applied by the common law to a common mover of

Did the truth of the representations afford any justification of libel at common law? Why did they not? Do they under our statute laws?

Give the definition of common barratry. What does the word “barrator” signify?

strife among neighbours, in courts or elsewhere about the country; but the appellation was most frequently deserved by knavish attorneys.

No single act can constitute this offence, since it consists in the common practice of acts of barratry. Neither can a man be guilty of it in respect to any number of false actions brought in his own right; for if they are false, he has the costs to pay. But an attorney at law who entertained a person in his house, and brought several actions in his name when nothing was due, was found guilty. The punishment is fine and imprisonment, and the offender is liable to be disabled from practising in future, if a member of the bar.

MAINTENANCE is the officious intermeddling in a suit that one is not interested in, by maintaining and assisting either party, with money or otherwise, to prosecute or defend it. The term is metaphorically drawn from the succouring of a young child that learns to go by one's hand.

This offence is almost unknown in this country, but in ancient times the interference of persons of great power and influence in disputes between those in the humbler ranks of life was much dreaded. It was formerly the rule that if a person who was no lawyer, and had no interest in the cause, should take upon himself to do the part of a lawyer, or if, after a suit was begun, he should encourage either of the parties or yield them any aid or help, it would be unlawful maintenance. But one who had an interest in the thing in dispute, or was related to one of the parties by kindred or in respect of the social

What number of acts are required to constitute this offence? Can one be guilty of it in respect to false actions brought in his own right? What is the punishment? Give the definition of maintenance. How is the term derived? What was formerly the rule as to persons who were not lawyers interfering in suits?

relations of landlord and tenant, master and servant, &c., might assist such party without incurring this charge. It is a misdemeanour by the common law, and is punished by fine and imprisonment.

CHAMPERTY is the bargaining with a plaintiff or defendant to divide with him the land or other property sued for, in consideration of the champertor carrying on the suit at his own expense. Such a bargain, being contrary to law, is, of course, void; but it is also a species of maintenance, and is punishable by the common law in the same manner.

The giving a part of the property in dispute to an attorney or counsellor at law, after the end of the suit, for his reward in bringing the controversy to a successful issue, is not champerty if there was no precedent agreement relating to such gift; but if it is agreed by a lawyer and his client, before the action is brought, that he shall have part for his reward, it is champerty. An agreement, however, that a lawyer shall have a certain percentage of the amount recovered, or a portion of the property equal to such percentage, does not amount to this offence.

EMBRACERY is the attempt to influence a jury by corrupt means—as by promises, persuasions, entreaties, threats, money, entertainments, and the like. By the common law, if one, not being an attorney or lawyer, came to the bar with one of the parties when a matter was on trial and spoke in the case, or stood in the court to survey and overlook the jury, whereby they were intimidated or influenced, or put in fear or doubt, he was called an *embraceor*.

NEGLIGENCE OF OFFICERS is the failure of officers of

Define champerty. What kind of agreements between a lawyer and his client amount to champerty? What is embracery? What is meant by negligence of officers?

justice to perform their official duties, or to perform them in a proper manner. Every sheriff, coroner, constable, or other officer of justice, who neglects his duty, is guilty of a misdemeanour punishable by fine and imprisonment, and in very notorious cases his office, if it be a beneficial one, may be forfeited. In most of the states, there are statute laws giving a specific remedy to persons injured by the negligence of officers, and criminal prosecutions are rarely resorted to.

OPPRESSION BY OFFICERS is when an individual is injured by some corrupt act of a judge or other officer, assuming to act under colour of the authority conferred by his office. This is a very grave offence, and may be prosecuted by impeachment before the legislature, or by indictment in the common courts; or the guilty officer may be first impeached and removed from office, and afterward indicted and punished for the offence.

EXTORTION consists in any public officer taking unlawfully, and by colour of his office, from any person, any money or thing of value that is not due to him. This offence is punishable by the common law where it is in force, and by the statutes in other states.

OBSTRUCTING THE EXECUTION OF LEGAL PROCESS is a high offence. A party opposing the execution of criminal process becomes a participator in the crime committed—as an accessory, in general, but in treason as a principal.

THE ESCAPE FROM CRIMINAL PROCESS by the party himself is an offence punishable by fine and imprisonment. So is a *breach of prison* by any person lawfully committed, and a *rescue*, or the forcibly freeing another from lawful

How is it punished? What is oppression by officers? How may it be punished? What is extortion? What is the consequence of obstructing the execution of legal process? What is the consequence of an escape from criminal process, a breach of prison, or a rescue?

arrest or imprisonment. It is a criminal offence to furnish any prisoner in custody with arms or instruments by means whereof he may accomplish an escape by force or otherwise.

CHAPTER LXXXV.

OF COMMON NUISANCES.

COMMON NUISANCES may be committed or created either by the doing of a thing which is an unreasonable annoyance or injury to the citizens in general, or the neglecting to do a thing by one whose duty it is to do such thing, whereby, in consequence of such neglect, the public are annoyed or injured. If the annoyance is only to some particular person, and not to the community in general, it is a *private* nuisance and the subject of a civil action only.

One species of common nuisances consists of obstructions of highways—such as roads, streets, bridges, and navigable watercourses—by rendering the same inconvenient or dangerous to pass. Highways being for the public use and accommodation, any person actually obstructing them, and such persons as are bound by their official duties to keep them clear and in good repair but suffer them to become obstructed by want of reparations, may be indicted for the nuisance. In some cases, the township, municipal corporation, or county at large, in which a highway is situated, may be prosecuted in its corporate capacity.

What is a common nuisance? How is it distinguished from a private nuisance? How may obstructions of highways become common nuisances? Who may be prosecuted for such nuisances?

By the common law, every unauthorized obstruction of a highway, to the annoyance of the people in general, is an indictable offence. Thus, if the proprietor of a large number of wagons or vehicles of any kind, which he employs in his business, suffers them to remain on the side of a highway on which his premises are situated, an unreasonable length of time, he is guilty of a nuisance. So, if a merchant obstruct the street near his place of business by placing there barrels, boxes, or lumber, which occasion an interruption of the free use of the public highway, it will be a nuisance.

But a mere transitory obstruction which must necessarily occur by the reasonable use of the highway is excusable, if reasonable promptness is exerted to remove it. Therefore, the erection of a scaffold to repair a house, the unloading a cart or wagon, or the delivery of bulky articles, if done with as little delay as possible, are lawful, though if they were suffered to remain on the highway an unreasonable length of time they would become nuisances.

When a party who has been indicted for a nuisance continues the same, he may be again indicted for the continuance. And, independently of legal proceedings, any person may lawfully abate a common nuisance, occasioning an obstruction of a highway, by removing it. But, in such cases, so much only of the thing that causes the nuisance ought to be removed as is necessary, and the party removing it has no right to convert any of the materials of which it is composed to his own use, but should

How may a person create a nuisance on a highway near his place of business? What is the rule as to transitory obstructions occasioned by the use of highways? If a party who has been indicted for a nuisance continues the same, for what may he be again indicted? How and in what manner may any person abate a nuisance to a highway, without any legal proceedings?

merely remove them to such distance as may be required. They should also be carefully deposited in a safe place, where the owner may obtain them without any unnecessary injury being done to them.

Nuisances to watercourses by actual obstruction may be occasioned by any diversion of the stream, or by placing any thing therein whereby the current is weakened or obstructed and rendered incapable of safely carrying vessels of the same burden as before. But if a vessel sink by accident in a river, though it obstruct the navigation, if the owner removes it within a reasonable time he will not be indictable. As in the case of other highways, temporary obstructions occurring accidentally or necessarily by the use or improvement of the stream will not be considered nuisances.

The carrying on of a trade or manufacture which, by creating an offensive smell or otherwise, is detrimental to the public in general, by impairing the enjoyment of life or property, is a common nuisance. So is the keeping of a bawdy-house, tippling-house, gaming-house, or place of any kind for the carrying on of immoral and unlawful sports, or even of lawful entertainments, if the proprietors or those who frequent the place conduct themselves in such a disorderly manner as to incommode and disturb the neighbourhood.

The punishment for nuisances is generally limited to a fine—the principal object of a public prosecution being to have the nuisance removed and to prevent its recurrence. In some instances, however, the offender may be subjected to imprisonment. There are numerous statutes in force in the several states defining various kinds of nuisances,

How may nuisances to watercourses be occasioned? How may the carrying on a trade or manufacture be a common nuisance? What kind of houses are there that are considered nuisances? What is the punishment prescribed for committing nuisances?

and there are ordinances and by-laws of the different cities and towns to the same effect. In some states lotteries are declared to be nuisances, and prohibited under heavy penalties, while in others they are lawful. In many cities and towns the keeping of gunpowder in large quantities within the limits of the corporation, and the making or selling of fireworks or squibs, or the throwing them about on the streets, are declared to be nuisances, on account of the danger thereby incurred.

CHAPTER LXXXVI.

OF THE MEANS OF PREVENTING OFFENCES.

WHEN there is reasonable ground to apprehend that a criminal offence is about to be committed, it may, in many instances, be prevented by requiring the suspected person to give security to keep the peace or for his good behaviour.

Any court or magistrate may demand security to keep the peace at their own discretion, or upon the request of any person, upon due cause being shown. Wives may demand it against their husbands; or husbands, if necessary, against their wives. But married women and minors are not bound themselves, for, in consequence of their legal disabilities, they are not capable of entering into a binding engagement. They must, therefore, find

What statutes and ordinances are there respecting nuisances?

When there is reason to apprehend an offence will be committed, how may it be prevented? Who may demand security to keep the peace? How are married women and minors bound?

security by means of their friends, who are bound for them. If the party called upon to find sureties fail to do so, he may be immediately committed to prison until he does.

A justice of the peace may require such surety of all those who make any affray in his presence, or threaten to kill or beat another, and such as are brought before him by a constable for a breach of the peace committed in his presence. When a private person desires to have another bound to keep the peace, he must make an affidavit that he has just cause to fear that the party named will do him some corporeal injury by killing, imprisoning, or beating him, or will destroy or do some injury to his property, as by burning his house—and that he does not make the application from malice or for vexation. This is called swearing the peace against another.

The security is given by the party from whom the offence is apprehended being bound with one or more sureties in a recognizance or obligation of record, whereby the parties acknowledge themselves indebted to the state in a certain sum if default be made in the accompanying condition. The condition is that the party bound as principal shall appear in court on a certain day, and, in the mean time, shall keep the peace toward all people, or toward the people generally and particularly toward the person who craves the security.

This condition may be broken by any actual violence, or even an assault or menace to the person of him who demanded the recognizance, if it be a special one, or by

What may be done with a party who is required to give security to keep the peace and fails to do so? Of whom may a justice of the peace require such security? What must a private person do to have another bound to keep the peace? How is the security given? What is the condition of the recognizance? How may the condition be broken?

any unlawful action whatsoever that either is or tends to a breach of the peace, if the recognizance be general.

When such a recognizance is taken by a justice of the peace it is certified to the proper court to be held in his county or circuit. At the next term of such court the party bound as principal may be called, and if the condition of the recognizance shall have been broken by any breach of the peace in the mean time, the recognizance becomes forfeited or absolute, and the party and his sureties, being now the absolute debtors of the state, may be required to pay the sums for which they are respectively bound.

If the recognizance be not forfeited, the party bound may have the prosecutor called to show cause, if he can, why such party should continue longer bound; and the court will then hear witnesses on both sides, for the purpose of ascertaining whether the person on whose application the surety was taken had any really sufficient grounds for his apprehension of injury. If, upon such investigation, it is found the application was made upon slight or frivolous grounds, the recognizance will be discharged and the party dismissed; but if the court consider that the security ought to be continued, the party will be required to enter into another recognizance, with sureties, to keep the peace for such length of time as may be prescribed.

What does the justice do with the recognizance after it is taken? When and how may the party bound as principal be called, for the purpose of ascertaining whether the condition has been broken? What is the consequence if it has been broken? How and for what purposes may the party bound have the prosecutor called? If the security was required on frivolous grounds, what is done? If the court think the security ought to be continued, what is required?

CHAPTER LXXXVII.

OF THE ARREST AND COMMITMENT OF OFFENDERS.

ALL persons whosoever are, without distinction, equally liable to arrest in criminal cases ; but no person should be arrested unless charged with such a crime as will at least justify holding him to bail when taken.

In making an arrest, the body should be actually touched or confined. But when an arrest is made on suspicion, the prisoner should not be put in fetters or bonds, unless he has attempted to escape, or it is necessary to prevent his escaping.

It has been already stated that any magistrate, sheriff, constable, or other officer possessing similar powers, may arrest any person committing a criminal offence in his presence. A sheriff or constable may also, when a felonious crime has actually been committed, or a dangerous wounding whereby manslaughter or murder is likely to ensue, without warrant, and upon probable suspicion, arrest the person believed to be guilty. But, in general, a sheriff or constable cannot, without a warrant, justify the arrest of a supposed offender upon suspicion of his guilt, unless some felony has actually been committed, and there is reasonable cause for the suspicion that the party imprisoned is guilty.

A private person has the right and is, indeed, bound by the law, to arrest the criminal when any felonious crime is

What persons are liable to arrest in criminal cases ? How should an arrest be made ? When may a magistrate, sheriff, or other officer arrest without a warrant ?

committed in his presence. He may break open doors in following such criminal, and if he kills him, provided he cannot be otherwise taken, it is justifiable. And when a felonious crime has actually been committed, a private person, acting with a good intention, and upon such information as will afford reasonable and probable grounds of suspicion, is justified in apprehending the suspected person without a warrant, in order to carry him before a magistrate. But in this latter case he acts at his peril, and is liable to an action for damages unless he can prove that a crime was actually committed by some one, and that there was reasonable ground to suspect the prisoner. When the offender is not likely to abscond, it is, in general, better to procure a warrant, because the officer who executes it is protected from liability, and no action can be maintained against the party procuring the warrant, though the arrest was made without cause, unless it can be proved that it was obtained maliciously.

In some instances arrests may be made to prevent the commission of a crime. Any person may lawfully lay hold of a lunatic whom he should see about to commit any mischief which, if committed by a sane person, would be a criminal offence. Or any one may arrest another whom he should see on the point of committing a felony, or doing any act which would manifestly endanger the life or person of a third party, and may detain him until it is reasonably to be presumed he has changed his purpose.

When a person is arrested before an indictment has been found against him, on a charge of having committed a criminal offence, he should be taken before a magistrate.

In what cases may a private person arrest an offender? To what extremity may he pursue the criminal? When may he arrest an offender on suspicion? What peril does he incur in doing so? Why is it better to procure a warrant? How may arrests be made to prevent the commission of a crime? When a person is arrested, what should be done with him?

If the arrest is made during the night, or at a time when a magistrate could not be found at his place of business, the prisoner may be detained in any secure place until a hearing can be had. But neither a private individual nor an officer has any right to detain a prisoner without taking him before a magistrate, for the purpose of collecting evidence in support of the charge against him. He should be taken before a magistrate forthwith if it be possible, and if it be not, as soon as it is possible.

Upon a delinquent being thus brought before a magistrate, it is the duty of the latter to hear the testimony adduced on both sides, and to discharge or commit the person arrested as soon as the nature of the case will admit. He may take a reasonable time for this purpose, and, to allow the evidence to be collected, he may postpone the examination from time to time, taking bail of the prisoner for his appearance at the time specified, or committing him to jail in the mean while.

As has been already stated, magistrates usually have jurisdiction to try and punish petty offenders. If it turns out that the offence committed was one within the jurisdiction of the magistrate, the accused person is either acquitted and discharged, or found guilty and subjected to the payment of such fine as the law requires.

If the offence is not one within the jurisdiction of the magistrate, the evidence is heard only for the purpose of ascertaining whether the prisoner ought to be held to bail or not. Should it manifestly appear either that no crime

For what purposes and how long may a person be detained before being taken before a magistrate? When brought before the magistrate, what must the latter do? How may he take time for the examination? What is done with the prisoner in the mean while? When the offence committed is one which the magistrate has jurisdiction to try, how is the case disposed of? If it is not one within the jurisdiction of the magistrate, for what purpose is the evidence heard?

was committed or that the suspicion entertained of the prisoner was groundless, the magistrate should discharge him. Otherwise, he must be required to give bail for his appearance at court, or, if he fails or refuses to do so, be committed to jail for safe keeping.

In this country, generally, all persons are bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great. Bail must, therefore, always be taken, if offered, except in cases where the prisoner, if found guilty, would be subject to the punishment of death; and in such cases also, unless the magistrate should, in the exercise of a reasonable discretion and his best judgment, find, from the evidence before him, that the prisoner is evidently guilty, or that the presumptive proof of his guilt is very strong.

The amount of bail required should be in proportion to the nature of the offence. It should not, on the one hand, be so excessive as to be unreasonable, and, on the other, it should not be so slight that the prisoner or his sureties would be tempted to suffer its forfeiture rather than to have a trial. The point aimed at should be an amount sufficient to insure the prisoner's attendance, and no greater or less.

The magistrate may also require the prosecutor, or any other person able to give material evidence against the prisoner, to enter into a recognizance to appear and give such evidence when required. A witness is not, however, to be compelled to find security. His own recognizance is all that should be required, and if he refuses to give this, he may be committed to jail for safe keeping.

What is done with the prisoner after the investigation? What persons are bailable? How must a magistrate determine whether a person is bailable or not? At what amount should the bail be fixed? How may the magistrate enforce the attendance of the prosecutor or of a witness to give evidence? What security can a witness be required to give?

CHAPTER LXXXVIII.

OF THE PRESENTMENT OR INDICTMENT.

THE constitution of the United States provides that no person shall be held to answer for a capital or otherwise infamous crime, but on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. There are also similar provisions in most of the state constitutions.

The mode of empanneling grand juries is prescribed by the statute laws of the General Government and of the several states. In general, a certain number of citizens, good and lawful men of the proper county, district, or circuit, are returned at each term of every court having general jurisdiction of criminal offences, to act as grand jurors. The number varies from thirteen to twenty-three, it being necessary that twelve shall constitute a majority.

The grand jury is usually empaneled in the court on the first day of the term, and the jurors are instructed in their duties by a charge from the judge upon the bench. They then withdraw from the court to some convenient room, to consult upon the business brought before them.

It is their duty to inquire what criminal offences have

What constitutional provisions are there as to the manner in which persons shall be held to answer a criminal charge? By what laws is the mode of empanneling grand juries prescribed? Of what number of persons does a grand jury consist? How is the grand jury usually empaneled when the court meets?

been committed within their county or district, and to prefer accusations against the offenders by presentment or indictment, that they may be brought to trial.

To enable them to do so, such commitments as may have been made and such recognizances of bail as have been taken by magistrates during the vacation of the court are laid before them, and the witnesses for the prosecution in each case are called in to give their evidence. But their investigations are not confined to such cases as may have been commenced before magistrates. They will hear the statements of any person who may have knowledge of a crime having been committed, though no previous steps may have been taken to arrest or accuse the offender; and if any of their own number have such knowledge, or know of persons who have, it is their duty to make the facts known and to cause the necessary witnesses to be summoned before them.

When a charge is to be made before a grand jury, an accusation is drawn up in writing, usually by the prosecuting attorney, which is called a bill of indictment. After they have heard the evidence, if they think the charge groundless they endorse upon it the words "*not found*," and then the party is discharged without further answer. But if they are satisfied, from the evidence given on the part of the prosecution, that, unless the person accused can, by some evidence on his part, rebut or controvert that given against him, the accusation is well founded, it is endorsed by their foreman "*a true bill*." The indictment is then said to be *found*, and the party stands indicted.

The grand jurors do not hear evidence on the part of

What is the principal duty of the grand jurors? By what means do they ascertain the offences that have been committed? What is a bill of indictment? What does the grand jury do with it if they think the charge groundless? When is the indictment said to be found?

the person accused, but only on behalf of the prosecution, for the investigation before them is not a trial, but only an inquiry whether a party should be put upon his trial. It is required, however, that in all cases twelve of their number should agree to find a true bill; and when twelve of them have so agreed, it is the duty of their foreman to endorse it, although he may be one of a dissenting minority.

The grand jurors summoned to attend a county court held in one of the states are sworn to inquire only for the body of the county; and, therefore, they cannot regularly inquire of a fact done out of the county. But when a man is wounded in one county and dies in another, the murderer may be indicted in either; and if larceny be committed in one county and the goods carried into another, the thief may be indicted in either, for the offence is complete in both. For robbery, burglary, and the like, the offender can only be indicted in the county where the crime was actually committed; for though the carrying away and keeping the goods is a continuation of the original taking, and is, therefore, larceny in the county where they are found, it is not a robbery or burglary in that jurisdiction.

The grand jurors who attend the federal courts are sworn to inquire what offences have been committed against the laws of the United States, within the district for which the court is held. They are not confined to county limits, and when such offences have been committed upon the high seas or in any place out of the

On whose behalf do the grand jurors hear evidence? How many of their number should be agreed to find a true bill? For what portion of the country are the grand jurors summoned to attend a county court sworn to inquire? What offences are there for which the criminal person may be indicted in either of two counties? How are grand jurors who attend the federal courts sworn?

jurisdiction of any particular state or territory, the offender may be indicted in the district where he is found or into which he may be brought.

In the discharge of their duties, the grand jurors may make a *presentment*, which is a charge founded on their own knowledge of some offence committed within their county or district, such as a nuisance ; but upon such presentment, after it has been delivered into court, the proper officer of the court must frame an indictment before the party presented can be brought to trial.

When the grand jurors have found an indictment they return it to the court, and, thereupon, a warrant is issued to arrest the person charged, if he has not been previously arrested in consequence of proceedings commenced before a magistrate. If he has been arrested and held to bail, he is bound to be present on the first day of the term, and to present himself whenever called upon at any period during the term until the cause is finally disposed of. If no proceedings have been previously had, process issues to the sheriff or other proper officer of the court to make the arrest. Upon an arrest made after an indictment has been found, the prisoner is committed to jail or held to bail until a trial can be had, in the same manner as when the arrest is made by the warrant of a magistrate.

An indictment must be in proper form, and its contents must be set forth with sufficient certainty. The county in which the offence was committed, the name of the offender, and the time when the criminal act was done, to show that

In what place may an offender be indicted for an offence committed out of the jurisdiction of any state or territory? What is a presentment? How can a person presented be brought to trial? What is the course of proceeding after an indictment has been found? What is done with the offender after he is arrested? What must the indictment contain?

the prosecution is not barred by the statute of limitations, must be stated. The offence itself, with all the facts and circumstances necessary to constitute it, must also be set out with clearness and certainty; and in some crimes the technical words defining the offence must be used, for no other words, however synonymous they may seem, are capable of doing it. In indictments for murder it is necessary to say the party indicted *murdered*, not "killed" or "slew;" and in larcenies, the words *feloniously took and carried away* are essential, for these only can express the very offence. The indictment should conclude with an averment that the offence was committed contrary to the form of the statute or statutes in such cases made and provided, when the prosecution is founded on the statute laws.

CHAPTER LXXXIX.

OF THE ARRAIGNMENT AND PLEADINGS.

WHEN a person who has been indicted appears, either voluntarily or as a prisoner brought in by legal process, to answer the charge made against him, in the proper court, he is immediately arraigned.

The *arraignment* is the calling the accused person to the bar of the court, to answer the matter charged against him by the indictment. He is called by his name; and he is usually told to hold up his hand, but as this is merely to signify that he owns himself to be of that

When must technical words be used in an indictment? How should it conclude?

What is an arraignment? How is the defendant called?

name by which he is called, it is not an indispensable ceremony.

The indictment is distinctly read to him, that he may fully understand what is charged against him. It is then demanded of him whether he be guilty or not guilty of the crime whereof he stands indicted.

Upon the arraignment it may happen that the prisoner *stands mute*; that is, he may either make no answer at all, or answer foreign to the purpose, or matter not allowable. If he stands mute of malice, or will not answer, though capable of doing so, the court will order a plea of "not guilty" to be entered on his behalf, which will have the same force and effect as if he had voluntarily pleaded it.

But if there is any reason to doubt whether the refusal to plead does not really proceed from inability, the court may empanel a jury to try whether he stands obstinately mute or whether he is dumb *by the visitation of God*. This jury may consist of any twelve persons who happen to be present. If the jury find the prisoner is dumb by the visitation of God, the court will use means to make him understand the arraignment and convey his answer; but if this be impossible, unless his disability proceed from insanity, a plea of "not guilty" will be entered for him, and the trial will proceed. In such cases, it is the duty of the court to examine all the points for him on the trial, as counsel for the prisoner, or appoint some competent person to do so, and see that no advantage is taken of his condition by the prosecutors to convict him unjustly. When the party indicted is deaf and dumb, he may, if he

How are the contents of the indictment made known to him? What question is then put to him? If he stands obstinately mute, what is done? If there is any reason to doubt his ability to plead, what may the court do? If it is found he is dumb by the visitation of God what is the course pursued?

understand the use of signs, be arraigned, and the meaning of the clerk who addresses him conveyed to him by signs, and his signs, in reply, explained to the court.

If, upon the arraignment, the prisoner confesses that he is guilty of the matters charged against him, the court has nothing to do but to record the confession and award judgment; but courts will not willingly receive a confession in capital cases, and will generally advise the prisoner to retract it and plead to the indictment.

The plea is the defensive matter alleged by the defendant in answer to the indictment, supposing him neither to confess nor to stand mute. Before entering a plea, the court will usually inquire of him if he have counsel to assist him in his defence, and if he have not and is without means to procure such assistance, the judge will appoint some attorney of the court for that purpose.

As in civil cases, the defendant may *demur* to the indictment; that is, he may admit the facts therein stated, but say they are not stated in proper form, or do not, in matter of substance, amount in law to a criminal offence as charged. Upon a demurrer being thus put in, issue is joined by the prosecutor on behalf of the state, and the question of law is determined by the court. If it be determined for the defendant, the indictment is dismissed or quashed, and the prisoner is discharged. But if the indictment is adjudged to be good, the prisoner must plead again to it, or judgment will be pronounced against him.

The prisoner may also, as in civil cases, put in a *plea in abatement* to the jurisdiction of the court, but this is rarely done, for objections which may be taken to the

If the prisoner confesses that he is guilty of the offence charged, what remains to be done? What is the plea? How may the defendant demur? By whom is the issue raised by a demurrer decided? What is done after the decision upon a demurrer? If the court has no jurisdiction of the cause, how may the prisoner plead?

jurisdiction of the court may, in almost all instances, be taken under the plea of "not guilty."

Special pleas in bar are rarely necessary. They are used, however, when the prisoner has been indicted on a former occasion for the same offence, and either convicted or acquitted. If convicted and punished, he cannot be punished again, and if acquitted, he cannot be again tried, but the fact of such former trial should be pleaded in bar of the present prosecution.

If the defendant has received a pardon for the offence charged, he should plead it. It is also said that if a county or township is indicted for not repairing a highway, and the burden of repairing was upon some other person or persons, they must plead specially the liability of such persons, and show the reason of it.

In all other cases the defendant must plead *not guilty*, which, in most cases, is pleaded orally, simply by the prisoner saying so, in reply to the question asked him whether he be guilty or not guilty. This plea is otherwise called the *general issue*, and it requires the prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment. The defendant, on the other hand, may give in evidence, under this plea, not only every thing which negatives the allegations in the indictment, but also all matters of excuse and justification.

The issues made by the plea of not guilty must be tried by a jury, unless the defendant voluntarily chooses to waive his right to a jury trial, and both parties agree that it may be submitted to the judges for determination.

In what cases are special pleas in bar used? How must the defendant plead in other cases? What is the plea of "not guilty" called? What must the prosecutor prove when this plea is put in? What may the defendant prove? How must the issue made by this plea be tried?

CHAPTER XC.

OF THE TRIAL, JUDGMENT, AND EXECUTION IN CRIMINAL CASES.

THE trial is conducted in the manner stated in a former chapter. In all cases, however, when capital punishment or imprisonment would be the result if he should be convicted, the defendant must be personally present, in order to abide the consequences. If he has given bail for his appearance, the court will not suffer the trial to proceed in his absence, though when the punishment to be inflicted is merely a fine, it is not unusual to permit the defendant to be represented at the trial by his counsel, as in civil cases.

After a verdict has been rendered by the jury, motions in arrest of judgment or for a new trial may be interposed, as in other cases. After the judgment, if the defendant conceives that any errors have been committed to his prejudice, he may have the case taken to a superior court by a writ of error; but this does not suspend or delay the execution of the judgment rendered while the case is pending in the superior court.

The only modes of avoiding the execution of the judgment are by a reprieve or pardon.

A *reprieve* is the withdrawing of a sentence for an interval of time. The courts, in some instances, are authorized to

In what cases must the defendant be personally present at the trial? What motions may there be interposed after a verdict? How may the defendant have the case removed to a superior court after judgment has been pronounced? Does the pendency of a writ of error suspend or delay the execution of the judgment? What are the modes of avoiding the execution of the judgment? What is a reprieve?

grant reprieves ; but, in general, the power to reprieve, as well as the pardoning power, is lodged in the executive department of the government. Reprieves are granted for various causes, and at the discretion of the government. If a woman capitally convicted is found to be pregnant, or if the offender becomes insane after judgment has been rendered and before the execution of the sentence, reprieves are granted as a matter of course. They are sometimes granted when a writ of error is taken to a superior court to give time for an examination of the errors alleged ; and when there is any ground to suppose that injustice may have been done in consequence of false testimony, the want of testimony, or by other means, the party is sometimes reprieved to give time for further investigation.

Offences against the laws of the United States can only be pardoned by the president of the United States. Those committed against the state laws may be pardoned by the governors of the states respectively.

After judgment has been rendered against a criminal, and he is neither reprieved nor pardoned, nothing remains but to execute the sentence.

In capital cases, a day for the execution is sometimes appointed by the court rendering the sentence, and sometimes the court merely sentences the prisoner to be executed on a day to be fixed by the executive authority. In the mean time he is placed in prison, and there kept until the time appointed for his execution arrives.

In this country, capital punishment is inflicted by hanging the criminal by the neck until he is dead. As has already been stated, it must be inflicted by the proper officer of the court, or his deputy, at the time and in the

For what causes are reprieves granted ? By whom may pardons be granted ? How is the day of execution fixed in capital cases ? What is done with the prisoner in the mean time ? How is capital punishment inflicted ? By whom must it be inflicted ?

manner appointed. It is the duty of the officer to see that the sentence be fully executed, and, therefore, if by any accident the criminal be not thoroughly killed, and revives, the sheriff must hang him again.

If a criminal should escape from prison after being sentenced to capital punishment, and remain at large until after the day appointed for his execution and then be recaptured, the executive authority may appoint another day for his execution, in the same manner as by a reprieve.

When a prisoner is sentenced to be imprisoned, he is, as soon as it can conveniently be done, conveyed to the jail or penitentiary provided for the purpose. He is there kept during the period specified, and then discharged.

When a fine only is imposed, the defendant may be required to pay it immediately, or to give security for its payment within a certain period; and upon his failure to do either, he may be committed to jail until the money be paid or security be given, as the particular law under which the conviction is had may require. The judgment binds the property of the defendant, and an execution may be issued to make the fine and costs by the sale of such property, as in civil cases.

Should a condemned person escape, and remain at large until after the day fixed for his execution, can the sentence be carried into effect? What is done with the criminal who is sentenced to be imprisoned? When a fine only is imposed, how is it collected?

THE END.

